

3 Ways To Protect Diversity If Layoffs Are Unavoidable

By Vin Gurrieri

Law360 (April 6, 2021, 6:12 PM EDT) -- The economic havoc wrought by COVID-19 is forcing some businesses to shed workers and leaving many employers fearful that layoffs will undermine efforts to make their workplaces more inclusive. But when reductions in force can't be avoided, experts say these three tips can help safeguard diversity.

In a recent survey of about 250 human resources department leaders, Baker McKenzie found that a sizable majority is worried that downsizing could cause their companies' diversity, equity and inclusion initiatives to suffer.

More specifically, 67% of those who responded to the law firm's online survey voiced concern about marginalized groups being left behind as a result of workforce restructuring. Meanwhile, two-thirds of the survey's respondents said that workforce reductions are planned over the next two years, and 17% said that some downsizing has already taken place within their organization, according to the firm's data.

Michael Brewer, chair of Baker McKenzie's global employment and compensation practice, said that some companies confronting the challenge of balancing looming cutbacks with their DE&I commitments are having flashbacks to the late 2000s when the financial crisis significantly undercut diversity gains. Employers don't want to see a repeat of what happened during that period, he said.

Although a large number of employers "are mindful of the issue," they are still struggling to figure out how to strike the right balance given the "tension between D&I initiatives ... and a need to reshape and restructure the workforce," Brewer said, while adding that "there are a chunk of employers who I think this issue is going to sneak up on."

"Organizations have become increasingly vocal about committing to diversity and inclusion as core priorities, but the reality of impending cuts and restructuring has HR leaders concerned that hard-fought gains in these areas are at risk," Brewer said. "Companies are trying to navigate a path forward that balances the complexities of [diversity and inclusion] goals alongside plans to redistribute and reallocate their workforces — it can be a tall order."

Here, Law360 looks at three things employers can do to make sure diversity efforts don't fall by the wayside.

Do Your Homework First

A common misstep that employers make right off the bat when they embark on a reduction in force, furlough workers or undertake some other form of business reorganization is failing to consider what the workforce will look like afterward — information that should guide their strategy.

That is especially true in the context of diversity if layoffs stand to disproportionately affect a department or segment of the business where there are high numbers of women and people of color.

For employers, that means making sure they know what they're getting into ahead of time by conducting an impact analysis that games out exactly what their planned moves will mean for different groups of employees. Those analyses — long a common tool employers have deployed ahead of mass layoffs and reductions in force — can paint a clear picture for a company about whether any specific groups within their workforce may be acutely hit, attorneys say.

"That impact analysis should include a diversity and inclusion analysis also. There's no reason not to include that," said Bonnie Mayfield of Dykema Gossett PLLC, who also said that diversity and staff reductions don't necessarily have to compete with one another and can instead be "correlative" so that diversity is protected.

Brewer said he believes adverse impact analyses are "key" because they allow businesses to identify ahead of any restructuring whether any "statistically significant disparities" exist for protected characteristics, like race, gender or age.

William deMeza, a partner at Holland & Knight LLP whose practice includes counseling employers on reductions in force as well as issues involving equal employment opportunity laws, offered a similar outlook, saying that impact analyses have been key in helping some clients find problems that turn up before they greenlight staff cuts.

"When you look at all the numbers and you put in all the characteristics, does it appear from a statistical analysis that greater numbers of women or minorities are being released?" deMeza said. "And if it appears that way from statistics, then go back and assess either the process — maybe there was something wrong in the decision-making protocols or processes being used — or maybe there is something amiss in individual decisions."

Keep Experts in the Loop

Besides potentially being lax in prepping for any necessary cutbacks, businesses also run the risk of rolling back diversity gains if they don't consult with people within their organization who are most familiar with diversity, equity and inclusion issues.

If an organization has a point person who oversees DE&I programs — a chief diversity officer, for example — that person should be brought into the mix when possible reductions and layoffs are being discussed.

"I think you have to have diversity, equity and inclusion leaders in the room where it happens," Mayfield said. "They should be part of the decision-making process, I think, with respect to layoffs and reorganization. Those folks may have a different perspective, [and] they may see things that others who are not leaders or in [the DE&I] space might not see."

Besides company officials, businesses can also lean on worker groups for input. DeMeza noted that some clients and employers are turning to internal employee affinity groups for feedback and guidance.

Those groups — caucuses of workers who share common traits or concerns, like LGBT people, workers of the same ethnicity or parents — have become increasingly popular in workplaces in recent years and can help bring to light issues affecting particular segments of employees that management might not otherwise know about or consider.

"When decisions are being made, have someone from the affinity group offer thoughts about either the process that's being used in identifying folks to be released or sometimes specifically about people who are targeted for possible reduction or for possible layoffs," deMeza said.

Baker McKenzie's Brewer similarly noted that leaders should be cognizant that bias "can creep in" to decision-making and that cost-cutting measures are not immune to it. Adverse impact analyses and diversity officials each have a part to play in a company's broader strategy to stem any potential discrimination before it happens, he said.

"They're looking at what is the rate of selection for each group, whether it's age, gender or race. And having the C-suite diversity officer play a role in that process is a good way to ensure that the selections are made fairly and will not undermine the company's D&I efforts," Brewer said.

Beware of 'Last In, First Out' Policy

One way that employers typically choose who gets ousted as part of a workforce reduction is by letting go of the most recent hires first.

But tapping workers for layoffs in that way — even though it has long been a popular approach for businesses since it offers a veneer of objectivity that may blunt bias claims — can severely undermine their DE&I efforts, particularly if their diversity programs are still fairly new and recent hires include more people from traditionally underrepresented groups.

"I think 'last in, first out' has traditionally been viewed as an easy way of doing it because then it's less likely to be subject to attack for discriminatory decision-making," deMeza said. "The problem is that 'last in, first out' may not always reflect an emphasis and desire for diversity."

Instead of looking at a worker's tenure with the company or the date a person was hired relative to their peers when planning staff reductions, businesses may be better served assessing how a person performs in their job and their overall value to the organization, Dykema Gossett's Mayfield said. In doing so, businesses will be better able to take diversity into account.

"Tenure is a great thing, and certainly employees that have been around for a while ... have a lot of historical and other value to the company. But so do individuals who may be newer to the organization," Mayfield said.

"If the organization is more situated and really involved with DE&I and has threaded DE&I throughout the organization, then when you go into a layoff situation it's just a matter of ensuring that thread of DE&I continues in that process too. It should be in the hiring process [and] the termination process. It should be in all aspects of a company," she added.

Separately, businesses can prevent downsizing from competing with DE&I initiatives and make sure that no one demographic group is disproportionately affected by considering "alternatives to layoffs," according to Mayfield, who noted that an employer can opt instead to reevaluate the hours people work, have them rotate work days or shave nonessential operating costs to protect as many jobs as possible. That also ensures that businesses don't lose out on the benefits that having a diverse workforce brings.

"I think that there is a movement afoot to look at DE&I. I'm hoping that companies take tangible action towards that," Mayfield said. "I think that DE&I benefits companies because the data is out there that shows that diverse teams are profitable. [They] have different and sometimes better and more creative ideas than non-diverse teams. So DE&I efforts, I think, are beneficial for organizations."

--Editing by Haylee Pearl.