

Navigating Reductions in Force in the Life Science Industry

By Margaret J. Strange & Michael Jakowsky

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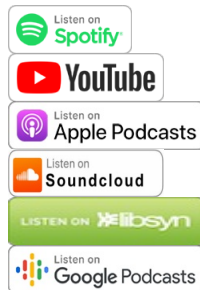
Life Sciences

Details

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Jackson Lewis P.C. · Navigating Reductions in Force in the Life Science Industry



Transcript

Alitia Faccone:

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues. It is our job to help employers develop proactive strategies, strong policies, and business oriented solutions, to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind, "How will my business be impacted?"

The life sciences industry is certainly not immune to changes in the economic climate, while never an easy decision for employers, some life sciences companies have had to lay off or reduce their workforces to help refine their strategies and streamline their operating structure. On this episode of We get work™, we discuss lessons learned from recent life science industry reorganizations and reductions in force. Our hosts today are Peggy Strange and Michael Jakowsky, principles in the Hartford and New York City offices of Jackson Lewis. Peggy is the life sciences industry group co-leader and believes that proactive innovation and support are the keys to a successful client relationship in a dynamic and ever-changing workplace. Peggy looks for ways employers can achieve the same goals as their employees. Mike wants his clients to know that they can rely on him for support, no matter the concern, and he works with management teams on achieving and maintaining compliance, including when and how

employers need to warn employees when terminations are imminent. Peggy and Mike, the question on everyone's mind today is, "What should life sciences employers consider when adjusting staffing levels? And how does this impact my business?"

Peggy Strange:

Hello, I'm Peggy Strange, and I am here with my friend and colleague, Mike Jakowsky, who knows more about reductions in force than anyone I know. So Mike, today, we're going to talk about making these critical decisions about workforce restructurings, and we know life science clients do not want to do reductions in force. No one does. But I wanted to ask you about some tips and trends to help. So you practice in the area of reductions in force. So tell me, a client calls and says, "Hey, Mike, we have to cut costs immediately, on a Friday, before a three day weekend. We had a product that was not approved. Our sales are down," what do you say? Do you offer them options? What do you do?

Mike Jakowsky:

There's no other way I would like to get a call in a reduction in force than on a Friday afternoon. And unfortunately, it happens all too often. And the first thing we explore is whether or not either of us have created a time machine, and if not, then we start kicking around some other options. I like to get a sense of why. Is it a decline in sales? Often happens, we're waiting on FDA approval or we didn't get FDA approval. Where we're talking about a decline in sales, I'll talk to them about, "Listen, our hiring freeze is an option, our changes to compensation structure." In the life science world, oftentimes, it's heavy on incentive compensation, bonuses, commissions, and are there any opportunities to cut costs in those spaces or reduce increases before moving on to the next step?

If we're talking about we're waiting on FDA approval, we didn't get it, but we're appealing, you could talk about some things, such as furloughs or staggered work weeks, where you're placing folks out of work unpaid for periods of time, with the understanding that, at some point in the near future, you may bring them back. When all else fails, we'll start talking about some reduction in force options. I do throw out a voluntary component, a voluntary reduction in force or retirement plan. Those have some pluses and minuses and are probably a whole different discussion. And then, if none of those are palatable or workable, then we'll move into the concepts of reductions in force or restructuring.

Peggy Strange:

So Mike, that's very helpful. You mentioned options I hadn't even thought of, cutting the bonuses or the commissions. And maybe we'll have our next discussion on another podcast about alternatives, but we've gotten here the reduction in force is necessary. What are some of the common mistakes employers make early on in the process?

Mike Jakowsky:

I think not understanding where they want to go. And so, oftentimes, where I'll start with is helping them better understand the path and the roadmap, because all too often, I see decisions having been made without understanding what they're going to need at the backend of the process and thinking through all the different legal landmines that they have to navigate, whether it's the Worker's Adjustment and Retraining Notification Act or the Older Workers Benefit Protection Act or any other unique state nuance. I think understanding how those things will impact the process will help you make a smoother plan. Because if you don't take those things into account, and it's just "Here are our decisions," once you got something in writing, you're kind of stuck with it. There's no ability to change it. You may be creating a paper trail or a fact pattern that may not be helpful. And so, I think, what I'll often try to do is get the decision makers to understand what we'll need at the end, to help guide them in the beginning.

Peggy Strange:

And unfortunately, Mike, you're saying senior leaders might make mistakes early on that we can't undo. So how can we make sure that that doesn't happen? Because we have all seen that happen, and it's a very difficult conversation, situation, to be in.

Mike Jakowsky:

Cut off their emails. No, I'm kidding. But assuming that that's not an option, then I think it's important to sort of set up, you can call it a RIF committee, you can call it whatever you'd like, but there should be a cluster of individuals, who are responsible for the process, thinking through whether it's the roadmap for decision making. Not everyone has to use the same criteria. That's just not workable. If you're in life sciences, you may want for your sales folks to use hard numbers. What are people selling? That's a results oriented business. If you are in the marketing department, it may be harder to gain those sales numbers or those true numbers or if you're looking at some other internal corporate areas. So not everyone has to use the same criteria, but folks should understand what the guardrails are, what the parameters are.

There should be a team of individuals who are responsible for the communications, both internal and external. I can't tell you how many times now there are massive leaks across the internet, where internal documents don't match external communications or the internal documents aren't worded the best. The social media landscape has changed reductions in force. There are websites dedicated to people talking about their layoff experiences. We'll see hashtag things on TikTok. So I think having individuals who are getting to guide us consistently through that process, I think the biggest challenge, in addition to not understanding what the legal landscape is, is understanding how important consistency is and how important words that are being used are. For example, I often see things such as restructurings, reductions in force, reorganizations used interchangeably, but they're not the same thing and they mean different things. And so, if there's no central team focused on consistency, it can create challenges at the backend.

Peggy Strange:

And what are the risks of using inconsistent terms?

Mike Jakowsky:

To use a legal term, it can create pretext. So if someone's going to sue for discrimination, they have to show that they were in a protected category, that they suffered an adverse action, and that the adverse action happened because of their protected category. Then the employer would show, no, there was a legitimate reason for doing so. And then, the employee would use other information to show pretext. So for example, in a reduction in force situation, I see the term "position elimination" thrown around a lot. Position elimination truly means that everyone in that position is going. Position elimination does not often mean you have five people in a job area and you're going down three. And so, sometimes, I'll see those words thrown into communications, not really fully understanding the impact, and then, an employee's terminated and will say, "You told me it was position elimination, but there are three people who are staying who are in my same position. And also, I just saw a job posting for someone with the same job title that I had, so it couldn't possibly be a position elimination."

Peggy Strange:

So to add to some of the challenges I know I hear about is "We don't want to do this all on this one Friday, so why don't we just do it over time? We'll take a couple of departments, we'll get rid of some people here, some people there, and we'll just make rolling decisions, because I think that'll be easier for our organization." Any problems with that?

Mike Jakowsky:

There's two different issues. There's going to be the legal one and the employee relations one. I guess the employee relations one I'll start with is death by a thousand cuts is sort of more difficult, and it can create employee relations issues, not just for those who are departing, but also for those who are staying and are living in a world of uncertainty as to whether or not they're going to be impacted next. And you have to think through the culture of your workforce. There are some clients I have that like to keep everyone on edge, and they do this. And it's a deliberate decision. They let everyone know "We're not done, we're going to continue." And they believe in their culture, and they may be right. It leads to better performance. There are some clients where, in their culture, it does not work, and it's going to lead to uncertainty. And the better performers aren't going to rise. They're going to depart.

And so, I think you have to think through how that works within your organization, because it's going to be different for everyone. From a legal landscape, it does pose challenges, right? There are some laws like the Worker Adjustment and Retraining Notification Act, which requires advanced notification if certain benchmarks and numbers are reached, and it has a 90 day aggregation period. And so, you may not meet it in the first wave, but the minute you meet it, you've triggered WARN, not just for the employees who are impacted at the point in time you reach it, but at anywhere in that 90 day period. And so, having a plan, if you're going to do these

staggered or rolled layoffs, to understand whether or not you're going to trigger it is going to be critical. Also, from a disclosure standpoint, by disclosures, I mean for individuals who are aged 40 or over, you're going to have some challenges. For individuals who are aged 40 or over, they have to get the job titles and ages of everyone who's selected for the program.

That's not just limited to folks who are terminated on the same day as me. It is everyone who is currently selected for termination. So if you're planning to roll out a phased layoff, you'll have to think through, logistically, "How are we going to do disclosures?" Because the worst thing from an employee relations standpoint is, if I get a disclosure on it, with someone else who's not going to be told for a month, and they find out, because I tell them, that is an employee relations nightmare. So there's nothing wrong with doing rolling separations, but there are a number of items that have to be thought through before it can be done effectively.

Peggy Strange:

So you're on your Friday afternoon call before your holiday weekend, and the leader says to you or the general counsel, "Who should we select? We don't know. We've never done a layoff before. What are some tips for selecting people? Should we just do like every other office? Or is there some other way to do it?"

Mike Jakowsky:

I think you want to always start with, "What's your business case? What are we doing? Are we looking for a cost reduction? So it's a true reduction in force, meaning we have to cut X dollars or X percentage from our budget. Or is the current system not working? Do we need to restructure or reorganize and really reposition everybody?" I think understanding what you need will then help the next steps. And then, so if we're just talking about a straightforward cost reduction, "Where do we need to reduce costs? Are we over headcount in certain areas? Are we not getting production in other areas? Are we understaffed in other areas?" And then, once you've identified both the business case and the targeted areas, I think you can move into the selection criteria, because I don't think a uniform selection criteria is practical, is my experience.

It's just saying "We're going to use seniority across the board" is great. As defense counsel, we love that stuff. But from a business standpoint, that may not be the case. It may be skillset is a better criteria, experience is a better criteria. Maybe in your IT groups, credentialing is a better criteria, and your sales groups, we're going to move based on hard numbers. So I think my tip is to figure out what your business case is, then figure out, where are the targeted areas, and then, move into the selection decisions. All too often, I see "We have the list, Mike. We're done." And then, we start talking about, "Okay, how did you choose these people?" And the response is, "I don't know, I just don't like them." Well, that's unfortunately going to be a really challenging answer for a variety of reasons, including some legal ones.

Peggy Strange:

So that's interesting. Different selection criteria for different groups, does that change what your release looks like at all for your people over 40?

Mike Jakowsky:

It may, because you have to, again, to secure a release for individuals who are age 40 or over, another piece of information they have to get are the selection criteria. So I think understanding the methodology by which individuals were selected helps shape the program, the decisional unit information, which is those that the person who selected was compared to who were not selected, as well as the selection criteria. So really understanding who made the decisions and how the decisions were made will make everything more easier at the back end, including some risk mitigation elements, such as the disparate impact analysis, which is looking at selection rates of people identified for termination versus people not identified for termination. And understanding how the decisions were made makes your life easier. When you're talking about, "Mike, we have three days to effectuate this," the more organized you are, the more likely it is that we could pull this off in a very tight timeframe.

Peggy Strange:

Speaking of timeframes, you're now done, you get your releases done, you made your selection criteria, and the general counsel says to you, "I just need these releases back like in three days. Can we just make a non-negotiable deadline to get these releases back, so I know who's signed and I can just move on?"

Mike Jakowsky:

The answer's going to be, "Who's impacted? What are their ages? And where are they?" Because there are some states that do require minimum consideration or revocation period. And certainly for individuals who are aged 40 or over, if you want to secure an age waiver, you have to give them 45 days to consider and seven days to revoke. If you shorten that period of time, then you might as well not seek the age waiver. And I do have some clients, not many, but we do have some clients that say, "Time is of the essence. I'm not going to give them 45 days to consider. I'm not going to give them seven days to revoke once they've accepted. I understand the risks that are posed. We're not securing an age waiver, but timing is more critical."

Again, to me, to risk balance, whether or not that is a feasible step or an advisable step, you have to know what the risks are. How many folks who are age 40 or over were selected versus how many who are under the age of 40 were not selected. If it's a very high percentage of age 40 or over, you have a higher risk pallet, and you may want to secure those waivers. And that may offset the need to get these releases signed in three to five days.

Peggy Strange:

The wrapping up, any unique life science issues that you see with clients?

Mike Jakowsky:

I think the biggest challenge is, "What do we do in the world of uncertainty where we're pending approval from an FDA or we get declined for FDA approval?" And we have, oftentimes in life sciences, what I see are teams dedicated to particular products. And so, if that product isn't out on the market, then there's no reason to have those teams. And so, figuring out, is it a short-term issue or a long-term issue helps figure out whether or not alternatives to reductions in force are feasible. The other two big ones are incentive compensation, that whether or not you have to pay, how you have to pay it, can you change it? Is it forfeited if there's a termination? It's all going to vary depending on both the plan and the state that the employee works in. And because it's an industry where a lot of the individuals are compensated on an incentive compensation and often fairly sizable incentive compensation, figuring that out is going to be critical.

And then, the remote employee conundrum, that faces everyone. And that's going to come up in a variety of different ways, both from a WARN perspective, figuring out where they count, where they don't count, and then, figuring out what state laws apply to final pay, to release agreements, to WARN. That's a challenge, and particularly with life science, where you could have a sales rep that lives in one state, but their market is in a different state, and they report it to someone in a third state. And so, I think figuring out those issues, ideally early on in the process and the planning stage, will be helpful for both risk evaluation and then, also ensuring a smooth end to whatever your reduction force or restructuring or reorganization initiative is.

Peggy Strange:

Well, Michael, it is a pleasure to spend time with you as always at the topic, it's a little bit tough, so thank you very much.

Mike Jakowsky:

Of course. Happy to help.

Alitia Faccone:

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