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# The Art of Performance Management, Employee Discipline, and Employee Separations

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**Seyfarth Shaw LLP**

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# Agenda

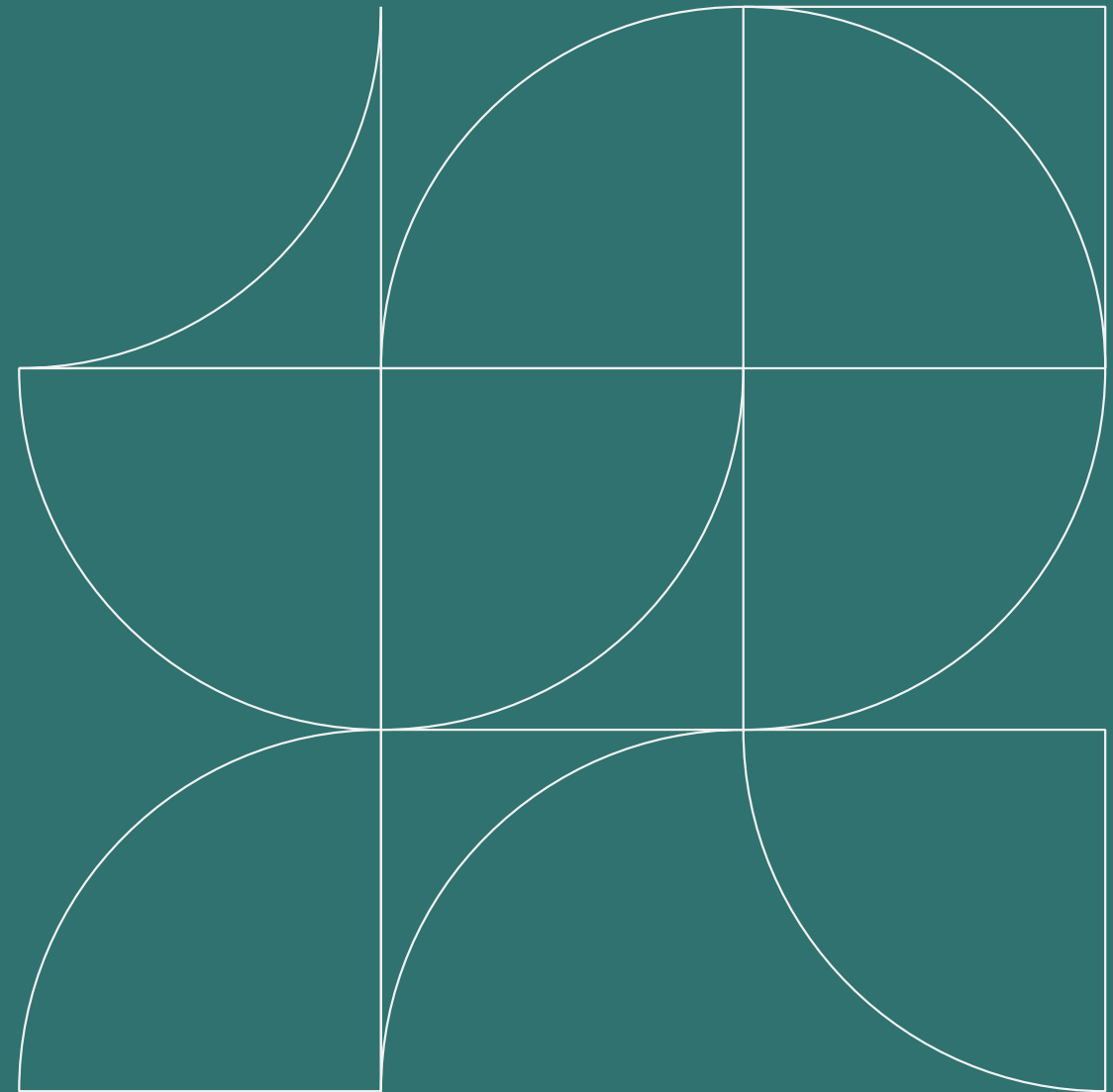
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**01** Performance Management

**02** Trade Secrets

**03** RIF Best Practices

# Performance Management



# Performance Management Best Practices

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- Provide performance feedback on a regular basis
  - Don't wait until an employee's annual review to provide feedback
  - Use the opportunity to reinforce your corporate culture
- Good documentation is vital
  - Include examples whenever possible
- Clearly communicate expectations
- Be consistent
- Differentiate between performance issues that can be fixed, and those that can't

# Managing Performance (without getting sued)

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- Be wary of the appearance of retaliation
- Be respectful, compassionate, and kind
- Don't delay – address issues as they arise
- Educate managers on phrases/words to avoid when giving performance feedback
- Document, document, document

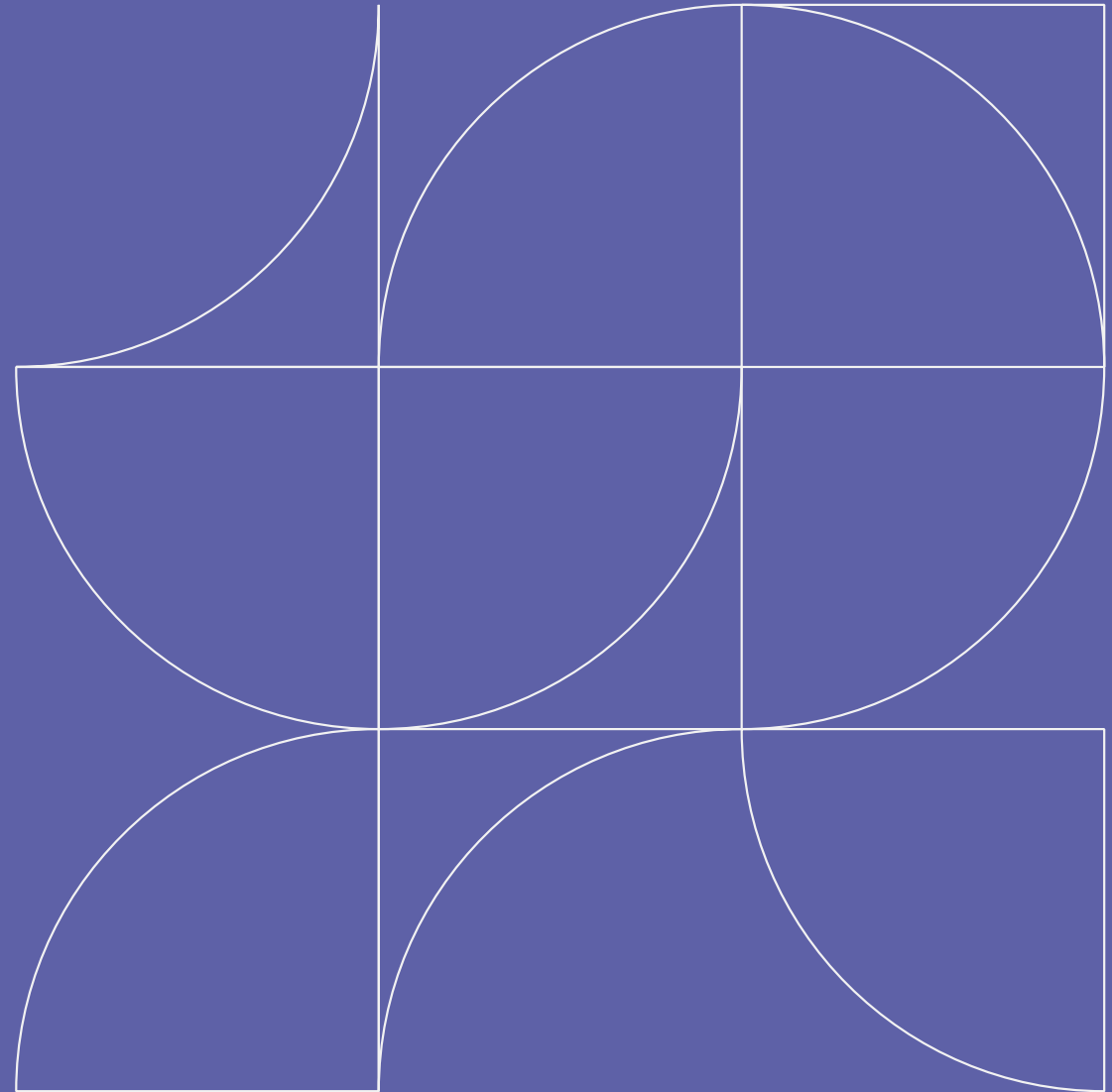
# Terminations

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- Always review for legal risk
- Plan for the termination meeting
  - Timing and location
  - Consider possible security risks
  - Have final paycheck ready (include all accrued, unused vacation and review to make sure it includes all paid sick days taken.)
  - Use talking points and stay on script
  - Have a plan for how you're going to collect equipment/computers, etc.
- Be respectful, compassionate, and kind



# Trade Secrets



# Reminder: Elements of a Trade Secret

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- California Civil Code § 3426.1(d) defines a trade secret as:
  - **Information**, including a formula, pattern, compilation, program, device, method, technique, or process, that:
    - 1) **Derives independent economic value**, actual or potential, from **not being generally known** to the public or to other persons who can obtain economic value from its disclosure or use; and
    - 2) Is the subject of **efforts that are reasonable under the circumstances** to maintain its secrecy.

# What are Reasonable Efforts to Maintain Secrecy?

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- Confidentiality agreements = leading indicator
- Information security
  - Password Protection
  - E-mail and Electronic Data Policies
  - Confidentiality Reminders on Screens
- Limit access
- Must take action against breaches
- Regular training on policies
- Exit interviews and documentation
- Limit information made available to vendors and subcontractors

# What are Reasonable Efforts to Maintain Secrecy? (Cont.)

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“But how could me speaking  
at the Secret New Products Seminar  
break our Confidentiality Agreement?”

# Trade Secret Protection Plans

**Purpose: Protect company's valuable assets, avoid misappropriation claims and satisfy reasonable efforts to maintain secrecy**

**Key points:**

- 1) Absolute secrecy and heroic measures are not required. But companies should stay current on latest in technology and law.
- 2) Identification of trade secrets should involve key stakeholders within a company and avoid one size fits all approach
- 3) Effective compliant agreements and policies and procedures
- 4) Employee education and “buy in” is essential to create a company culture that appreciates value of trade secrets and requisite “eyes and ears” to protect valuable assets
- 5) Recognizing blinders in company process and continuous improvement are key components effective plans
- 6) Consideration of onboarding and exit procedures and data/property equipment return

# Best Practices

## Interviewing a Competitor's Employees

- Discuss general skills and talents, not former employer's customers or trade secrets.
- Control interview and put employee at ease
- Make clear that the employee should not, under any circumstances, use or bring any of his former employer's information or solicit any former co-workers
- Focus on making the transition as smooth as possible for the former employer
- Consider reaching out to the employee's employer
- Check if the employee has any **existing agreements** with former employers before making an offer

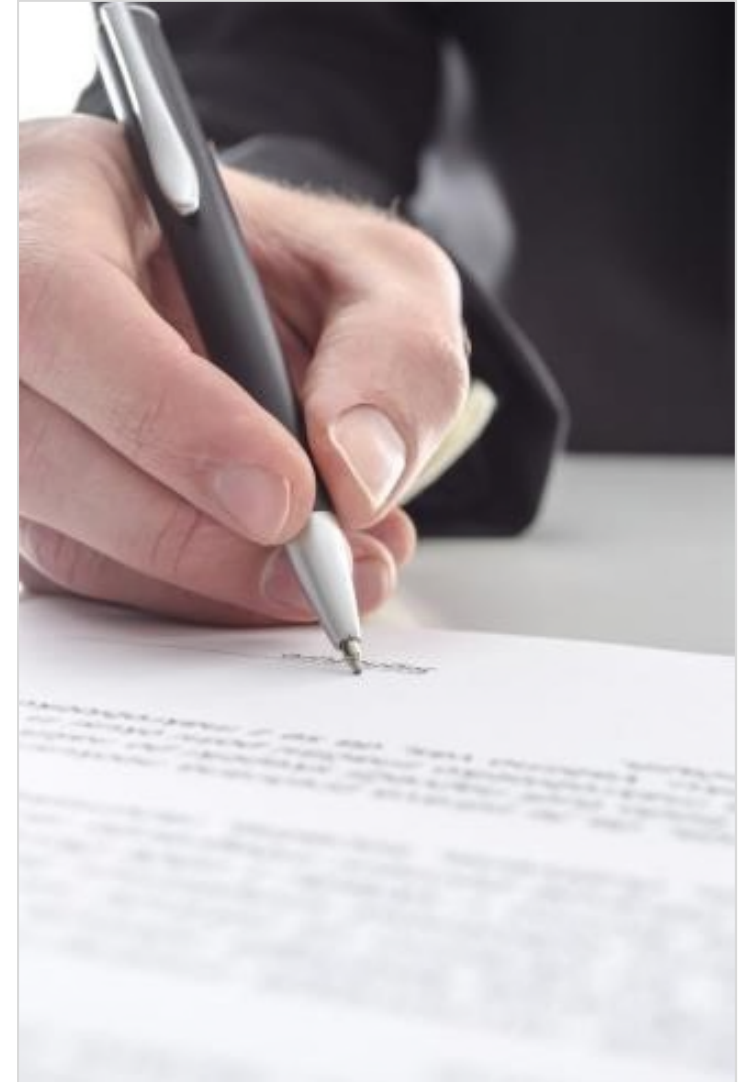
# Best Practices

## Hiring A Competitor's Employees

- Create a ***culture*** where employees understand confidentiality and what information that the company considers confidential
- Conduct new hire training on the importance of protecting company trade secrets and confidential information
- Emphasize the importance of non-disclosure and trade secret protection agreements
- Put in place continuing training – once is not enough! Have routine e-mail reminders and training
- Beware of inevitable disclosure (for jurisdictions that apply the doctrine)
- For sensitive hires, routinely follow-up with employee to ensure that he/she is honoring restrictive covenants

# On-Boarding Procedures

- What agreements should be in place for particular employees?
  - Non-disclosure and trade secret protection covenants
  - Invention assignment agreements
  - Acknowledgement that employee will not use prior employers' trade secrets and confidential/proprietary information and has returned all company property
  - Computer use and access agreements
  - Social media ownership and policies
  - BYOD policies
  - Remote work policies
  - Whistleblower protections





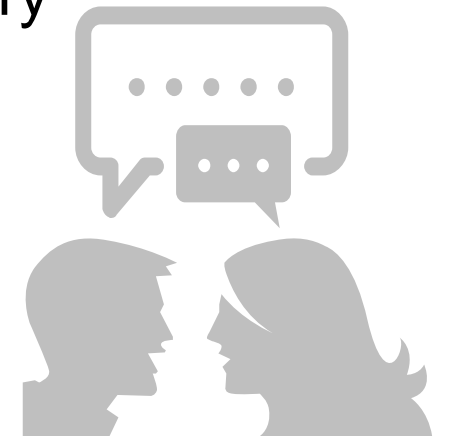
# NDA and Restrictive Covenants

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1. Clear policies and confidentiality agreements, “right-sized” for the company’s core valuable information.
2. Continued judicial scrutiny and hostility to overly broad, poorly defined, overreaching policies and agreements.
3. Protection for information that does not rise to the level of trade secret?
4. Ensure protections for whistleblowing and other legally protected disclosures.
5. Consideration of Forum Selection and Choice of Law provisions and interplay of Labor Code Section 925
6. Overly broad invention assignment provisions.
7. Employee non-solicitation covenants and employee mobility tension
8. Business to business non-competes under *Ixchel Pharma, LLC v. Biogen*
9. Arbitration considerations?

# Exit Interviews & Processes

- Must adapt due to inability for in-person exit interview
- Prepare for the interview, identify the trade secret and confidential information the employee accessed/used, consider having in-house counsel or HR and employee's manager present as appropriate
- Question the departing employee in detail
  - Ask employee why s/he is leaving
  - Ask employee what new position will be
- Check employee's computer activities and work activities in advance of the meeting
- Ensure that all company property, hardware, and devices have been returned, including email and cloud data, and social media accounts; consider using an inventory list
- Offer to have materials picked up from house, if necessary

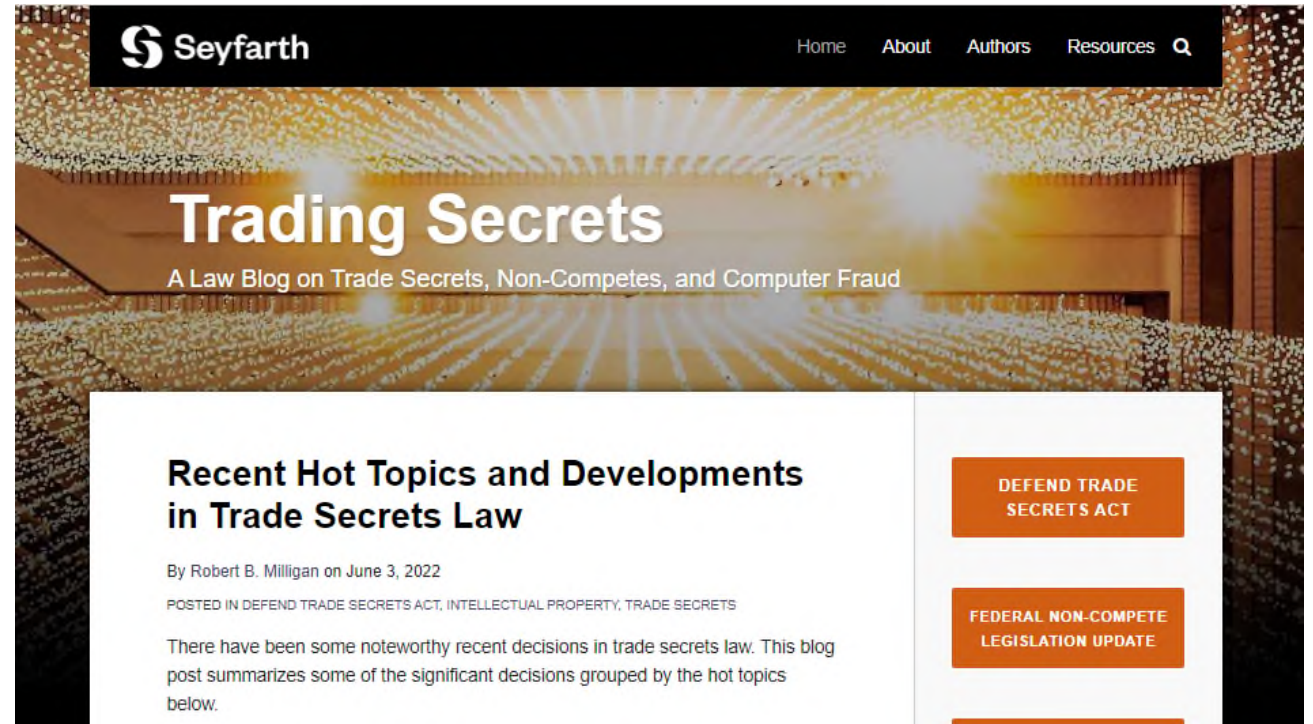
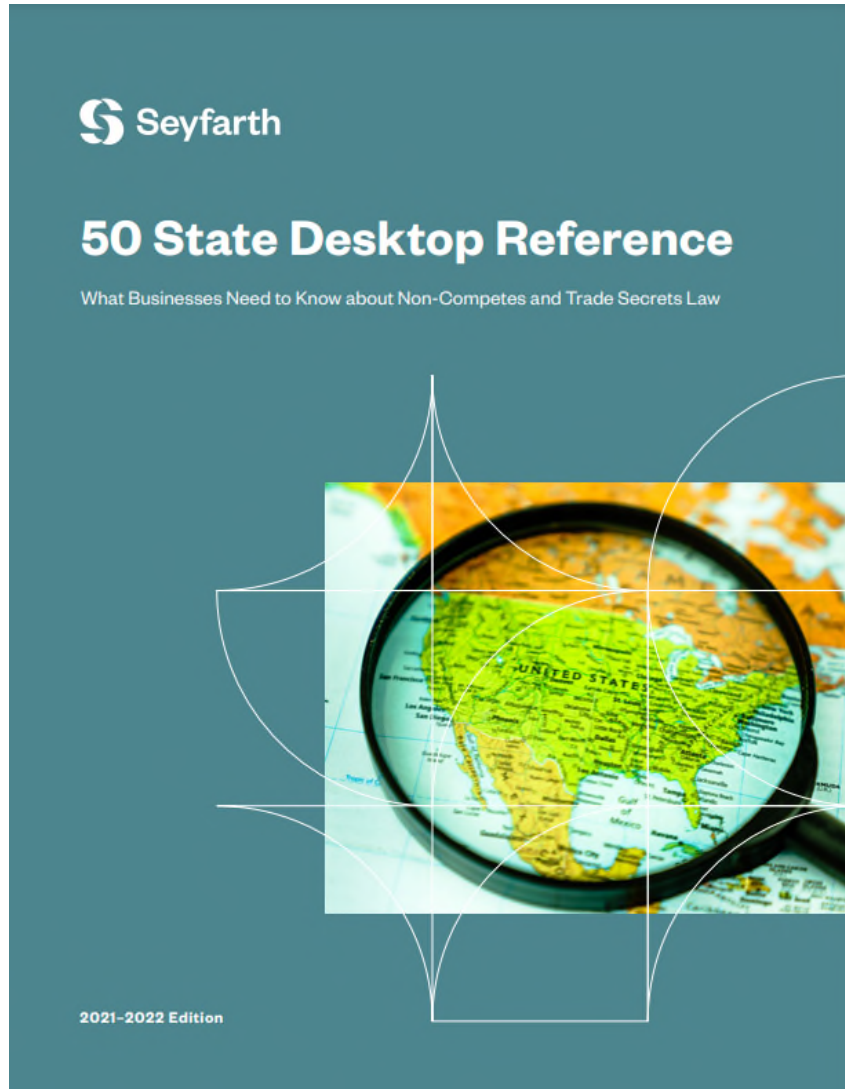


# Exit Interviews & Processes



- Ensure that arrangements are made to have all company data removed from any personal devices
- Disable access to company computer networks
- Make sure you obtain user names and passwords for all company social media accounts
- Inform the employee of continuing obligations under agreements with the company
- Consider letter to new employer and employee with reminder of continuing obligations
- Consider preserving departing employee's emails and/or forensically imaging electronic devices
- Consider using an exit interview certification

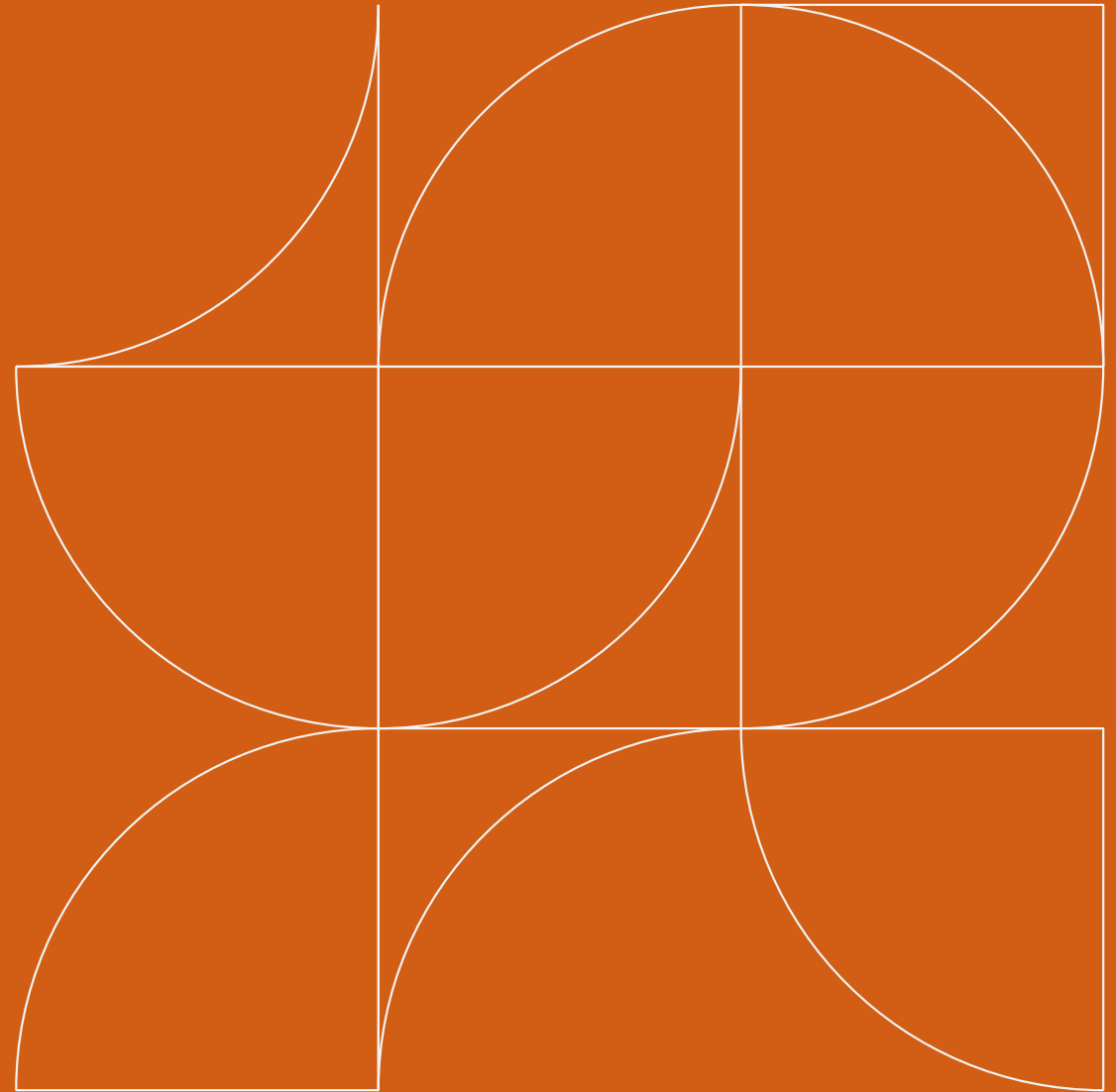
# Stay Up to Date on Trade Secrets & Non-Compete Issues



[www.TradeSecretsLaw.com](http://www.TradeSecretsLaw.com)

[50 State Desktop Reference](#)

# RIF Best Practices



# RIF Alternatives

## Why pursue alternatives?

- less likely to harm morale; shared-sacrifice
- lower legal risks
- stronger signal to the marketplace

# RIF Alternatives

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- Mandatory time off without pay
- Pay freezes
- Job sharing
- Voluntary separation plans
- Pay Reductions
- Temporary Shutdowns

# Document The Business Case

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- Identify specific business reasons for RIF
  - Cost reduction? Change in focus of business?
  - Change in market conditions? Change in customer demand?
  - Specific job functions to be eliminated/reduced/restructured?
- Articulate the goals for RIF
  - Number of EEs/positions eliminated/reduced?
  - Dollar amount saved?
  - Eliminating unprofitable work (close branch/facilities)
- Explain why any job functions or lines of business are exempt from RIF
- Document alternatives considered and rejected



# Develop Communication/ Notification Plans and Materials

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- Consider multiple methods for communicating information
- Communicate in steps to affected employees
  - Initial announcement, initial Q&As, later Q&As
- Be sure to explain reasons for RIF, functions affected, timetable and severance pay/benefits
- Consider external communications to
  - remaining employees, investors
  - third parties such as customers, vendors, media, local politicians
- Maintain appropriate tone for RIF activities
- Appoint contact person(s) to field questions

# Identify Your Employees

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- Who Are Your Employees?
  - Joint Employment Issues
  - Independent Contractor Issues
  - Agency Temps
  - Core Function Outsourced Workers
  - On Demand Service Providers
- Identify who will be included in the RIF process
- Review policies, severance and benefit plans for inclusion
- Avoid Disconnect between Legal and Operations

# Develop RIF Selection Criteria

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- Focus on objective criteria
  - Use only work-related criteria
  - Give credit for experience
  - Use seniority as tiebreaker where ability is equal
  - Identify additional selection criteria
    - Education, certification and licenses
    - Recent performance
    - Past performance *as a factor*
    - Measureable productivity (sales, production, revenue)
- Focus on *functions* affected, *not* persons
- Avoid using salary level as direct reason (in CA esp.)

# California: Salary as a Proxy for Age

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- Cal: Gov't Code Section 12941:
- “The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination.”

# Develop RIF Selection Criteria (Cont'd)

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- Subjective factors
  - Communication skills
  - Organizational skills
  - Teamwork (flexibility, cooperation, building/fostering teamwork)
  - Knowledge (functional knowledge, technical skills, etc)
  - Problem solving skills (creativity, judgment, analysis)
  - Leadership
- Subjective factors are lawful, but may result in inconsistent decision-making
- Courts closely scrutinize subjective judgments in RIFs because of potential bias and discrimination

# Create RIF Review Committee

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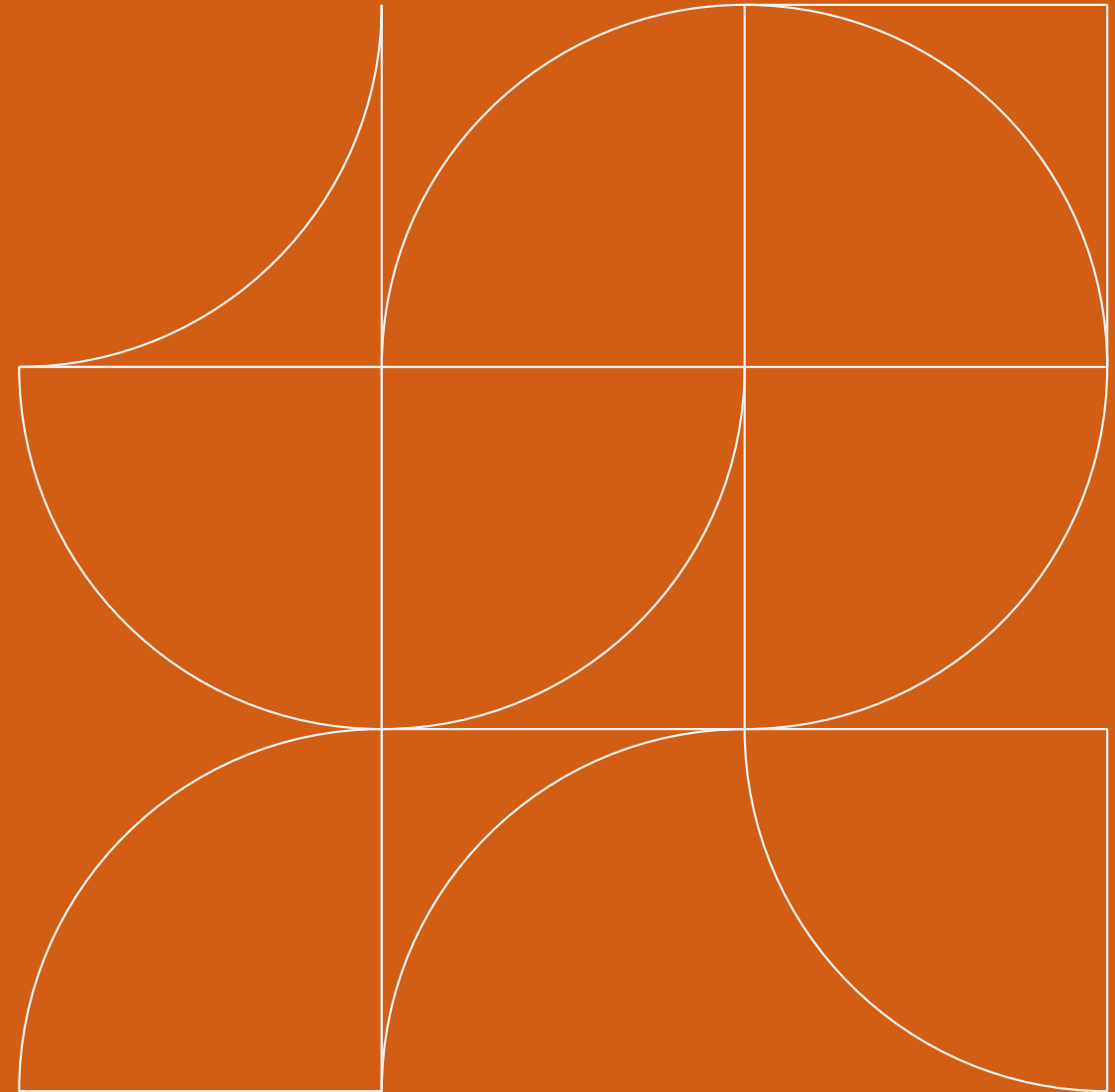
- Purpose
  - Make final decisions on individual terminations
  - Monitor EEO issues
  - Help ensure uniform, objective decisions and thorough review
- Committee composition:
  - Ensure over age 40/minority/female representation
  - Include top operational and human resource representation, in-house legal where possible
  - Include members who would make strong potential witnesses
  - Expose committee only to relevant data
    - Scrub employee identification information
  - Keep notes of decisions, not deliberations

# Pressure Test RIF Selections

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- Involve outside counsel where possible
- Scrub selections of older employees, minorities and women
- Consider implications on Affirmative Action Plans
- Use disparate impact results where possible (should RIF criteria be adjusted based on adverse impact?)
- Keep results and record privileged

# Avoiding Disparate Impact Claims





# Avoiding Disparate Impact Claims

## Disparate Impact Law In A Nutshell

- Under Title VII (women and minorities)
  - Business necessity analysis
- Under ADEA (employees age 40 and above)
  - RFOA Analysis

# Statistical Analysis Tool And Tips

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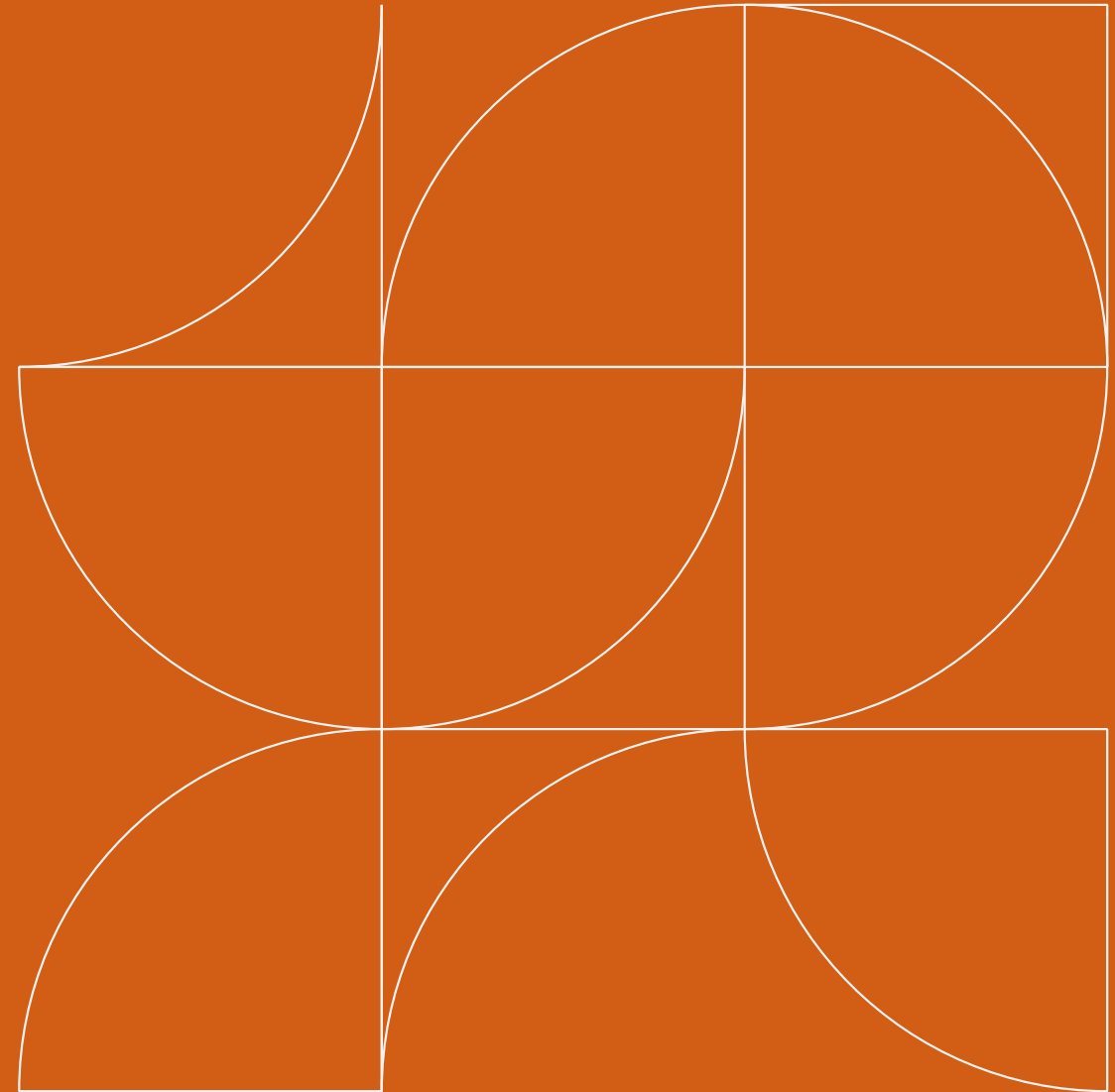
- Get all the right data up front
  - Usually available in HRIS
  - Make sure Legal is involved from the start
- Ask the right questions
  - Comparing selection rates for RIF is key
  - Use standard deviations analysis
- Know how to read the results
  - Standard deviations
  - Fisher's Exact
  - Selection rate comparisons

# Use Results With Caution

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- Any selection changes could jeopardize other decisions
- Exercise extreme caution as to race and gender (reverse discrimination risks)
- Age is oftentimes the issue
  - Remember RFOA – a lower standard for defending disparate impact
  - Employers have more flexibility to change selections because only older employees are protected
- Privilege at all steps is imperative

# Developing Enforceable Severance Agreements



# Origins of OWBPA

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- In 1990, Congress amended the ADEA by enacting OWBPA to clarify the prohibitions against discrimination on the basis of age and address waivers of rights and claims under the ADEA. 29 U.S.C. § 626(f)
  - EEOC has issued regulations. 29 C.F.R. § 1625.22-23
  - 2009 EEOC guidance / Case law? What case law?
  - Establishes requirements for a “**knowing and voluntary**” release of ADEA claims.
  - Imposes additional **disclosure requirements** when waivers are requested from a group or class of employees in context of voluntary or involuntary RIF

# Requirements for Waiver of Age Claims

1. Write in manner that is clearly understood
2. Refer to rights/claims arising under ADEA
3. Advise employee to consult attorney
4. Ensure employee has at least 21 days (45 days in group context)
5. Give employee 7 days to revoke
6. Exclude rights/claims that arise after waiver is executed
7. Provide consideration in exchange for release
8. Satisfy additional requirements for “group” releases

# What Information Must the OWBPA List Provide Generally?

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1. “Decisional unit”;
2. Eligibility factors for the program;
3. Time limits applicable to the program;
4. Job titles and ages of all individuals who are eligible or selected; and
5. Ages of all individuals in the same job classifications or organizational unit who are not eligible or selected

# Sample OWBPA Disclosure

Pursuant to the Older Workers Benefit Protection Act, this is a list of the job titles and ages of the employees in the ABC Company's Human Resources Department as of February 24, 2023, who were selected and not selected for termination effective March 1, 2023. ABC Company selected employees for termination on the basis of business needs, job requirements, and comparative skill sets. Selected employees are eligible for severance based on criteria in the ABC Company's Severance Plan.

Job Title	Age as of Date Selected	Age as of Date Not Selected
Area HR MgrEmployment		44, 57
CoordinatorHR		29
AdministratorHR		28, 51
Coordinator - AssocHR		25, 26, 30, 52, 58
Coordinator - IntHR	29, 44	28, 29, 29, 32, 38, 42, 53, 53, 61
Coordinator - LeadHR		49
Coordinator - SrHR		25, 29, 30, 37, 40, 41, 42, 51, 52, 53, 53, 60, 62
HR Generalist I	31, 39, 41, 53, 53, 62	30, 34, 35, 36, 38, 41, 42, 43, 46, 49, 50, 50, 50, 53, 54
HR Generalist II	37, 43, 56	33, 35, 39, 42, 43, 49, 49, 57, 61
HR Representative I		57
HR Representative II	61	35, 41, 48, 50, 59, 62
HR/Payroll Coord – Int		26, 29, 31, 31, 45, 45, 59
HR/Payroll Coord – Lead Lead		48, 66
Manager Division Human Res		33, 47, 47, 53, 55, 60
Sr HR Generalist		34, 40
Vice President HR/A	42, 49, 49, 51, 51, 54, 54, 58, 59, 66, 67	33, 38, 39, 39, 40, 40, 40, 40, 43, 44, 47, 49, 49, 51, 52, 52, 53, 53, 53, 54, 54, 56, 57, 61, 65
Vice President HR/B	36, 52, 53	30, 37, 38, 40, 43, 44, 47, 47, 51, 53, 57, 57, 58, 62



# Specific OWBPA Requirements

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1. Release Agreement Requirements. A waiver must be written in a manner that can be clearly understood
  - Avoid technical jargon and long, complex sentences
  - Don't include both a release and a covenant not to sue without explaining the difference
  - Must advise employee to consult an attorney
  - Refer to rights or claims arising under the ADEA

# Specific OWBPA Requirements

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2. Determine Whether You Have A “ Group Termination Program”? Whether a “program” exists depends on the facts and circumstances of each case
- The general rule is that a “program” exists if an employer offers additional consideration – or, an incentive to leave – in exchange for signing a waiver to more than one employee
  - By contrast, if a large employer terminated five employees in different units for cause (e.g., poor performance) over the course of several days or months, it is unlikely that a “program” exists (EEOC Guidance)

# Specific OWBPA Requirements

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3. Identify The Correct “Decisional Unit”. The class, unit, or group of employees from which the ER chose the EEs who were and were not selected for RIF
- Consider **org. structure / decision-making process**
  - **Eg:** Employer decides it must eliminate 10% of its workforce at a facility; the **entire facility** is the DU
  - **Eg:** Employer must eliminate 15 jobs and only considers employees in its finance department; the **finance department** is the DU
  - What about a multi-department RIF?
  - What about a multi-location RIF?

# Specific OWBPA Requirements

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4. Disclosure List Requirements. Strict compliance is required:
- Time periods for the “group program”
  - Use numeric ages, not birth dates

# Specific OWBPA Requirements

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5. Remember to include **all** employees in “decisional unit”.
- Include employees not selected (e.g., if you considered three departments, but are only making RIFs in one department, employees from all three departments may need to be included on OWBPA disclosure list)
  - IKs? Agency Temps?
  - Employees on leave?
  - Overseas employees?

# Specific OWBPA Requirements

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## 6. OWBPA List Should Include Selection Criteria

- Several federal district courts have held that an employer must identify – at least in general terms – the criteria used by the employer in selecting individuals for layoff
- Employers can satisfy their obligations by identifying broad factors (such as job criticality and job performance) in the releases
- EEOC Guidance appears to suggest this is best practice

# Specific OWBPA Requirements

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7. Disclosure For A Rolling RIF. An involuntary RIF in a decisional unit may take place in successive increments over a period of time. Information supplied should be **cumulative**, so that later terminees are provided ages and job titles/categories for all persons in the decisional unit at the beginning of the program and all persons terminated to date

# Other OWBPA Group Considerations

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Duress, Fraud, And Misstatements. OWBPA waiver will be deemed **invalid** if:

- Employer used fraud, undue influence, or other improper conduct to coerce the employee to sign it
  - Under-disclosure of information
  - In a voluntary program, lack of voluntariness
  - Obtaining release while knowingly not complying with OWBPA
- The disclosure list contains a material mistake, omission, or misstatement
  - Data and information not accurate as of the date shown
  - Inaccurate/sloppy/incomplete description of decisional unit



# Other OWBPA Group Considerations

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Conducting HR/Legal Review Will Not Enlarge Scope Of Decisional Unit. “Higher level review of termination decisions will not change the size of the decisional unit *unless the reviewing process alters its scope.*” (EEOC Regs.)

- OK for HR to monitor compliance with EEO laws
- OK for regional manager to review termination decisions from more than one facility
- “However, if the regional manager ... determinates that persons in other facilities should also be considered for termination, the decisional unit becomes the population of all facilities considered”

# Other OWBPA Group Considerations

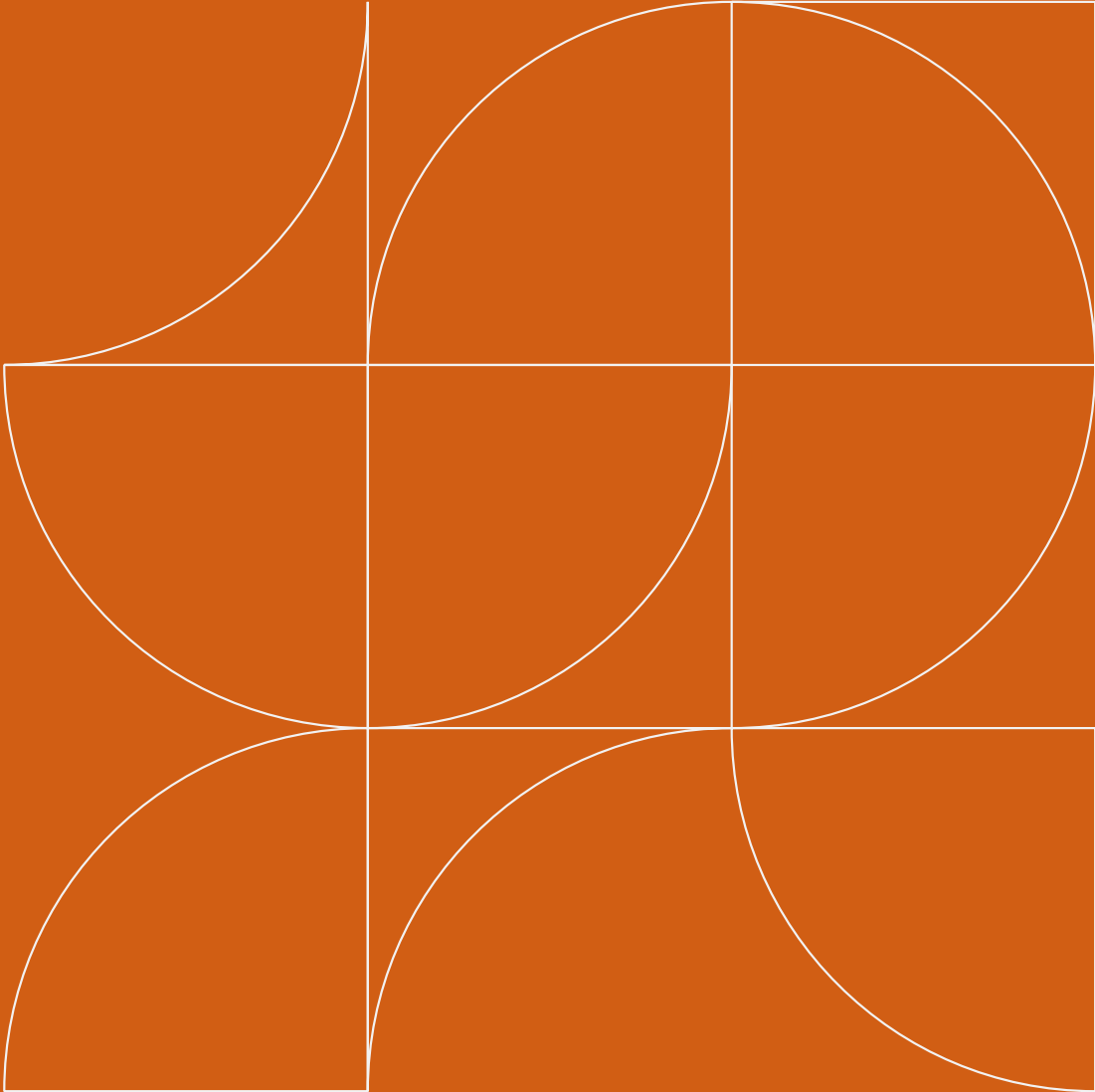
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## Beware Of “Claw Back” Or Fee-Shifting Provisions, And Of Releasing Claims That Cannot Be Released.

- “No ADEA waiver agreement ... may impose ... any other limitation adversely affecting [the] right to challenge the agreement. ... [including] provisions requiring employees to tender back consideration received [or] allowing employers to recover attorneys' fees ... because of the filing of an ADEA suit.”
- Do not include claims that cannot be released such as discrimination charges, unemployment/worker compensation claims, etc.

# RIF Best Practices Team

## Minimizing WARN/Cal-WARN Exposure



# The Basics

## The WARN Act is a federal law that:

- Requires ADVANCE WRITTEN NOTICE to affected employees and government agencies
- Where enough EMPLOYMENT LOSSES arise from
- COVERED EVENTS (“plant closing” or “mass layoff” at any “site”)

# Cost Of Doing It Wrong

- Two months of pay with benefits per employee
- \$500/day civil penalty up to 60 days (\$30,000)
- Attorneys' fees

# Employment Loss

- Termination;
- Layoff (but not a temporary layoff of less than 6 months); or
- Greater than 50% reduction in work hours
- In limited circumstances, an offer of job transfer does not count as employment loss

# Covered Event: Plant Closing

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Plant Closing =

- shutdown of single site of employment,
- shutdown of one or more facilities, or
- shutdown of one or more operating units

Resulting in

- “employment loss” of 50 or more employees (excluding part-time employees and those who have worked less than 6 months in prior 12 months)

During any:

- 30-day period (but must also consider 90 day period)

# Covered Event: Mass Layoff

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Mass Layoff =

- employment loss (not resulting from plant closing) at single site of employment for:
- 500 or more employees (excluding part-time employees and those who have worked less than 6 months in past year)

or

- 50 to 499 employees, if they make up at least 33% of employees at single site of employment (excluding part-time employees and those who have worked less than 6 months in past year)

During any:

- 30-day period (but must also consider 90 day period)



# The Counting Period

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- 30-Day Rule:
  - Coverage is automatic
- 90-Day Aggregation Rule:
  - Coverage is presumed if within a 90-day period, employment losses occur within the same single site of employment, each of which involves fewer than the number necessary to trigger coverage, but which together exceed the numbers necessary to trigger WARN
  - employer must then demonstrate that employment losses resulted from separate and distinct activity
  - Company of 125 employees lays off 15 employees on 4/10; 20 on 5/15; and 20 on 6/20.

# The Counting Period (cont.)

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- The 90-day aggregation rule precludes the aggregation of two events if either one is itself large enough to trigger the WARN
- Best practice: When planning layoffs and possible application of WARN, employer should look 90 days backward and forward

# Top 10 WARN Mistakes

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1. Full Time / Part Time. If there are sufficient employment losses – based on counting only “full-time” employees – to trigger WARN, then all employees (**including part-time employees**) experiencing the employment losses as part of the same WARN event are entitled to notice
2. Double Counting. If an employer has suffered a covered “plant closing,” it should not double count the affected employees when considering whether other employment losses constitute a “mass layoff.”

# Top 10 WARN Mistakes

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3. “Plant” is somewhat misleading. A “plant closing” can involve the shutdown of a discrete “operating unit” (e.g., departments, product lines, functions at the site)
4. “Closing” is somewhat misleading. The use of a skeleton crew (e.g., for windup or maintenance activity) will not avoid an otherwise covered “plant closing.”

# Top 10 WARN Mistakes

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5. Timing. WARN notices are effective upon receipt (not postmark date). If mailing, allow sufficient time to ensure that notices are received 60 days in advance
6. “One or more” A “plant closing” occurs if there is a shutdown of **one or more** operating units at a single site that results in 50 employment losses. Consider all shutdowns at the site collectively

# Top 10 WARN Mistakes

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7. Temporary employees. Temporary employees are counted in determining whether other employees are entitled to notice
8. Temporary employees. Temporary employees are not entitled to WARN notice if they were hired with an understanding that their employment would be limited to a particular project or undertaking. But they are entitled to WARN notice if they were hired for an indefinite duration

# Top 10 WARN Mistakes

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9. Damages Offset. The required backpay and benefits may be offset by any wages paid after the employment loss, or by any voluntary and unconditional payment not legally required
10. State Law. Many states have “mini-WARN” statutes with different standards

# Cal-WARN Basics

## Covered Establishment:

- The statute applies only to a “covered establishment” which is any industrial or commercial facility, or part thereof, that employs, or has ***employed within the preceding 12 months, at least 75 persons***



# Cal-WARN Basics

## Notice Triggers

- Notice requirements apply in the event of a “***mass layoff, relocation, or termination***” at a covered establishment. The word “termination” refers to a termination of operations, not a termination of employment

# Cal-WARN Basics

## Mass Layoffs Explained

- A “mass layoff” means a layoff during any **30-day period of at least 50 full or part-time employees** at a discrete “covered establishment.” California does not utilize the alternative 90-day test and does not distinguish between full and part-time employees in counting. (However, an “employee” must have worked for the employer for at least 6 of the 12 months prior to the date that notice would be due)

# Cal-WARN Basics

## Terminations and Relocations

- “Terminations” (and “relocations”) must involve ***all or substantially all of the operations at a covered establishment***, e.g., the closure of a department while maintaining other operations at a site might or might not constitute a covered closing
- These definitions do not specify a minimum number of employees who must suffer an employment loss or a time period for measuring the number of affected employees
- What constitutes “substantially all” is an undecided issue

# Cal-WARN Basics

## Sale of Business Issues

***Unlike the federal WARN Act, the sale of business exception is absent from the California law.*** One California case, however, has interpreted Cal-WARN to avoid triggering the notice requirements in a sale of business scenario. *Maclsaac v. Waste Management Collection and Recycling, Inc.*, 134 Cal. App. 4th 1076 (2005)

# Furloughs Can Trigger Cal-WARN Notice

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*Int'l Brotherhood of Boilermakers v. NASSCO Holdings, Inc.*, 17 Cal. App. 5th 1105 (2017), has applied Cal-WARN to temporary layoffs, making it clear that it would not read federal WARN's employment loss trigger of a 6-month minimum layoff into California WARN. While not committing to any particular standard, the court indicated that even a "brief" layoff was sufficient to trigger Cal-WARN

"The 'separation from a position' definition does not suggest a severance from the employment relationship must occur before the notice duty triggers. Instead it encompasses a temporary job loss, even if some form of the employment relationship continues and the employees are given a return date." *Id.* at 1118

# WARN and the Evolving Workplace

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- To Whom Do You Give Notice?
  - Joint Employment Issues
  - Independent Contractors
  - Agency Temps
  - Core Function Outsourced Workers
  - On Demand Service Providers

# Speakers

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The image features a solid orange background. On the left side, there is a white geometric design consisting of a vertical line, a horizontal line, and two curved lines that meet at the intersection of the vertical and horizontal lines, forming a shape reminiscent of a stylized letter 'K' or a decorative element. The text 'Thank You' is positioned on the right side of the image.

**Thank You**