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What Employers Need to Know Today About RIFs and the WARN Act

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Introduction

Many components to a reduction in force (RIF) program are ripe for litigation, both on an individual and a class action basis, and this litigation carries with it significant exposure.

ISSUE #1 The Basics and Planning Ahead

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

RIFs of any size are rife with potential legal risks and require careful planning and consideration.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

Why should group separations be treated differently than individual separations? The often larger scale of group terminations implicates other concerns, such as disparate treatment and impact claims, evaluating final pay requirements, developing defensible selection methodology and criteria and statutory notice requirements.

Articulate management's legitimate business reasons for conducting layoffs. The need to realize cost savings and a reduction in the number of an employer's work staff is among the most common reasons for conducting a group termination program. All levels of management involved in restructuring the employer's business should understand the rationale behind downsizing and have a consistent understanding of the goals to be achieved.

Identify the reduction goals and timeline. Before making any employment decisions, an employer must review its existing business units and determine the changes in size and function that will be necessary to enable the company to accomplish its business objectives after an RIF is implemented. Through this process, the employer can identify the labor costs that need to be reduced or eliminated and the number of employees by which the organization is overstaffed. The employer should also have a forward-thinking timeline for the rollout of an RIF program.

Review any prior written policies for implementing RIFs. If prior layoffs have been conducted, the employer should be aware of any existing policies and procedures that define the criteria for making layoff selections, the process that it needs to follow or the severance benefits to be provided for laid-off employees. Even if no obligations exist to conduct a restructuring in a certain manner, utilizing reduction procedures and benefits consistent with past practice can minimize employee resentment and claims of unfair treatment based on comparisons to prior workforce reductions.

Develop job-related selection criteria and procedures. Employers tasked with selecting employees for layoff can mitigate their exposure by identifying the business goals to be accomplished by implementing an involuntary workforce reduction or restructuring program, eliminating unnecessary positions that do not promote the attainment of such goals, establishing objective and consistent selection criteria and procedures designed to evaluate the ability of incumbent employees to perform tasks essential to accomplishing crucial business objectives and documenting the employer's termination and retention decisions in a cogent and contemporaneous manner.

Prepare written guidelines. It is extremely beneficial for employers to prepare written guidelines outlining the job-related skills, qualifications, experience levels, performance or proficiency measures or other factors that decision-makers will evaluate in selecting individuals for layoff.

Adopt selection procedures that enhance decision-makers' ability to apply selection criteria consistently. In addition to identifying job-related selection criteria based on necessary post-reduction business competencies, it is helpful for employers to develop protocols for decision-makers to follow in assessing layoff candidates on a consistent basis.

Review layoff recommendations for other red flags concerning employees with protected status and benefit eligibility. Employers should vet layoff

recommendations to determine whether any discharge candidates have unique risk areas.

Ensure selection decisions are supported by adequate documentation. In addition to using objective, job-related criteria to make initial selection decisions, employers can further reduce their exposure to legal claims by documenting the procedures and criteria (e.g., selection guidelines, lists of essential job functions and skills, performance comparisons, selection rationales) used to make selection decisions.

NOW THAT YOU KNOW — KEY TAKEAWAY(S)

Have a plan and clearly articulated selection methodologies.

ISSUE #2 Alternatives to Group Termination Programs

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

If evaluated in advance, some employers may find alternatives to engaging in an involuntary restructuring program.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

Alternatives to group termination programs. Management's options for reducing expenses without reducing headcount include: (a) hiring freezes, (b) wage and bonus freezes, (c) bonus reductions, (d) postponement of wage increases, (e) fringe benefit reductions, (f) job sharing, (g) employee transfers, (h) work furloughs of limited duration, (i) reducing work hours with proportionate pay cuts and (j) discontinuing the use of temporary and part-time employees and redistributing their work.

Voluntary attrition programs. Employers may even offer early retirement incentive programs and voluntary resignation incentive programs (VRIP) to avoid or minimize the need to discharge employees. Employers should carefully consider the eligibility criteria for these programs and whether or how they will disqualify departments, positions or individuals. Employers offering voluntary attrition programs must also create a timetable for the sequencing and implementation. These programs afford employees more control over their employment options without requiring employers to undertake adverse employment actions.

Employers can control the breadth or scope of a VRIP by limiting program eligibility to employees based on their length of service (*e.g.,* offering the option of program participation to employees with a minimum of 10 years of continuous service) or other objective criteria. Voluntary resignation incentives offered in connection with VRIPs often include severance pay, COBRA subsidies, pro-rata bonus payments or outplacement benefits.

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NOW THAT YOU KNOW — KEY TAKEAWAY(S)

Employers can reduce labor costs and risk at the same time by considering and implementing other initiatives such as voluntary attrition programs while maintaining some control over the participants.

ISSUE #3 The WARN Act

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

The WARN Act has many rigid requirements that employers should familiarize themselves with as a regular matter of business before engaging in any workforce reduction. The WARN Act would set outside parameters on when employees could be terminated. Knowing whether WARN would be triggered is crucial to setting your timeline.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

Employers considering involuntary group terminations must determine early in the decision-making process whether the number and location of the anticipated terminations will trigger the notice and other requirements of the federal WARN Act, 29 U.S.C. §§ 2101–2109, or similar statutes promulgated by the states in which the affected facilities are located.

Employers covered under WARN. WARN applies to employers who employ (1) 100 or more full-time employees in the United States (excluding part-time employees as defined by WARN) or (2) 100 or more full-time and part-time employees whose total weekly work hours (excluding overtime hours) equal or exceed 4,000 hours per week in the aggregate.[1]

Part-time employees are not included in calculating employee totals to determine WARN coverage, but they must receive appropriate WARN notices if they are affected by a plant closing or a mass layoff.[2] The WARN Act defines part-time employees as employees who work an average of fewer than 20 hours per week or more than 20 hours per week but have worked fewer than 6 months during the 12-month period before the required notice date.[3]

Actions that trigger WARN notice requirements. The WARN Act requires covered employers to give 60 calendar days' advance written notice of either a plant closing or a mass layoff to various individuals and government entities.

Plant closing. The requirement to issue WARN notices is triggered for a plant closing, which is defined in the statute as the permanent or temporary shutdown of a "single site of employment" or one or more facilities or operating units within a single site of

employment if the shutdown results in an employment loss at the single site of employment for at least 50 full-time employees during any 30- or 90-day period.[4]

A single site of employment can be a separate, stand-alone facility. However, separate facilities can be grouped together to constitute a "single site of employment" under certain circumstances.

Mass layoff. The statute defines "mass layoff" as a reduction in the workforce that is not the result of a plant closing and results in employment loss at a single employment site of employment during any 30- or 90-day period (1) for at least 50 full-time employees who comprise at least one-third of the workforce at the site or (2) for at least 500 full-time employees regardless of the percentage of the workforce they comprise.[5]

Aggregation period for both plant closing and mass layoff. WARN notice requirements will be triggered if a planned employment action, combined with additional employment actions taken or planned at the employment site during a 30-day or, under certain circumstances, a 90-day period before and after the action (other than terminations for cause), in the aggregate, will reach the minimum numbers necessary for establishing a plant closing or a mass layoff.[6] Some courts have held that employees who are separated more than 90 days before a plant closing may be entitled to receive WARN notices if their separations led up to the eventual plant closing.[7] If employees are not being terminated on the same date, the date of the first employee's termination under a covered plant closing will trigger the employer's 60-day notice requirement.[8]

Who Receives a WARN Notice? The WARN Act requires a covered employer to give 60 days' advance written notice of a plant closing or a mass layoff to various individuals and government entities.[9]

The contents of WARN notices to employees or their unions. WARN notices must contain the specific content required by the law.[10]

Service of WARN Notices. The employer may use any reasonable method to deliver WARN notices designed to ensure that recipients receive their notices at least 60 days before each affected employee's separation date (*e.g.,* first-class mail, personal delivery with the option of obtaining a signed receipt, hand delivery).[11] Employers can provide affected employees with WARN notices by inserting the notices in the employees' pay envelopes.[12] A ticketed notice (*i.e.,* a preprinted notice regularly included in each employee's paycheck or pay envelope) does not meet the requirements of WARN.[13]

Limited exceptions that permit less than 60-days' notice. The WARN Act provides some limited exceptions that may permit employers to provide employees, union officials, government officials and government entities with fewer than 60-days' notice of a plant closing or a mass layoff. We review three of those exceptions here. Under each of the exceptions, the WARN Act requires employers to "give as much notice as is practicable" and to include within the notice a brief statement of the basis for reducing the notification period.[14] Although these exceptions allow for a reduction of the notice

period, they generally do not excuse employers from providing WARN notices in their entirety.[15]

Exception One — Unforeseeable Business Circumstances. To qualify for this exception, the mass layoff or plant closing must be caused by business circumstances that were not reasonably foreseeable at the time the notice would have been required.[16] This type of circumstance is caused by a sudden, dramatic, unexpected action or condition beyond the employer's control. For example, such a circumstance might include a principal client's sudden and unexpected termination of a contract, a strike at a major supplier of the employer, an unanticipated or dramatic economic downturn or closings ordered by government agencies. The employer must exercise commercially reasonable business judgment that a similarly situated employer would use in predicting the demands of its particular market.

Exception Two — Faltering Company. This exception applies only to plant closings and requires the employer (1) to be actively seeking capital or business at the time the WARN notice is due and (2) to have a realistic opportunity to obtain the financing or business in question.[17] The employer must also show a good faith belief that giving notice would preclude the company from obtaining the capital or business it needs. In addition, the employer must show that obtaining the business or financing would have enabled the company to avoid or reasonably postpone the shutdown. The employer's actions are viewed on a company-wide basis, not just at the affected facility.

Exception Three — Natural Disaster. This exception applies when the plant closing or mass layoff directly results from a natural disaster such as a flood, earthquake, storm or drought.[18] The employer must demonstrate that the plant closing or mass layoff directly resulted from the natural disaster. The natural disaster may preclude full or any advance notice. However, the employer must still provide notice of an employment loss caused by a natural disaster, either in advance or after the occurrence of the employment loss.

WARN Enforcement. Employers that fail to provide affected employees with timely WARN notices may be liable for significant monetary penalties. A noncompliant employer is liable to each aggrieved employee for (1) back pay for each day of violation, up to the full 60-day notice period and (2) lost pension and welfare benefits (*e.g.,* medical, sickness, accident, disability, death, unemployment, vacation, training programs, daycare centers, scholarship funds or prepaid legal services) for each day of violation up to 60 days, including medical insurance premiums and actual out of pocket medical expenses the aggrieved employee incurs during this time that would have been covered under an employee benefit plan if the employment loss had not occurred.[19]

In addition, if an employer fails to provide the local government unit with its required WARN notice of a plant closing or a mass layoff, the employer can be subject to a civil penalty of up to $500 for each day of violation. However, there will be no civil penalty if the employer pays each aggrieved employee all amounts and benefits for which the employer is liable to the employee within three weeks from the date the employer orders

a plant closing or a mass layoff. Attorneys' fees for a prevailing plaintiff are also recoverable.

The aggrieved employee, their union representative or the local government unit can enforce their WARN Act rights by suing the employer in a U.S. District Court for failure to provide timely written WARN notices.

Depending on the jurisdiction, there may be practical alternatives to providing notice, such as garden leave or pay in lieu of notice. Importantly, many states have enacted "mini-WARN" statutes that expand the realm of employers covered by the mini-WARN Acts, lower the threshold for events to trigger the notice requirements, require different information in the WARN notices, add individuals or entities that must receive WARN notices, increase the amount of statutorily required notice or reduce the number of exceptions to providing full notice.

NOW THAT YOU KNOW — KEY TAKEAWAY(S)

There is no way to resolve a WARN issue after employees have been exited. The WARN Act and state mini-WARN Acts have many components that employers must be aware of at all stages of a RIF — from planning to implementation. As in-house counsel, being well versed in these laws is essential to guide leadership through these difficult business decisions.

ISSUE #4 Considerations for Remote Workers

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

When a RIF affects remote workers, they may be considered employed in several states, depending on the employment law at issue.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

The WARN Act, signed into law in 1988, fails to address how remote workers in today's working reality should be counted and treated for the purposes of a triggering event. Rather, the WARN Act addresses only out-stationed employees, such as traveling salespeople, who do not physically report to a particular facility for work. Before the COVID-19 pandemic, case law was emerging, with courts falling on both sides of the issue.

Generally, employment laws are triggered based on where an employee physically performs their work. Thus, final pay and severance agreements would generally be covered by the state law where the employee works (*i.e.,* their house). For the purposes of the WARN Act, however, which employment laws should be triggered is a bit more uncertain. For example, an employee who lives and works remotely in Florida for a company in New York will be paid in accordance with Florida's laws, but they may be an

employee in New York for WARN Act purposes if that is the location to which that employee reports or receives direction.

NOW THAT YOU KNOW — KEY TAKEAWAY(S)

When considering a RIF, conducting a privileged analysis of how remote workers will be counted and affected before implementing changes will help employers evaluate whether they are implicating relevant WARN and state mini-WARN Acts.

ISSUE #5 Special Considerations for Employees 40 Years or Older

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

Before undertaking any RIFs, employers must consider how they will comply with the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) (OWBPA) to the extent they intend to seek an age waiver. If employees selected for layoff are 40 or older, any releases of federal age discrimination claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), must comply with the OWBPA.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

Employers seeking to obtain enforceable waivers of ADEA claims must include information mandated by the OWBPA in group separation agreements to ensure the employees receiving the agreements are waiving any potential ADEA claims on a knowing and voluntary basis.

The OWBPA establishes a two-step mandate for employers to provide group terminees with sufficient information to enable them to assess the viability of any potential ADEA claims they may have. First, employers must comply with the OWBPA's informational disclosure requirements. Second, employers must refrain from including or excluding information from group separation agreements that has the "effect of misleading, misinforming, or failing to inform participants and affected individuals."[20]

In certain situations, one of the more challenging aspects of preparing a group separation agreement that satisfies the informational requirements of the OWBPA is determining what constitutes a program and which employees comprise a particular decisional unit. The OWBPA's implementing regulations define the term "decisional unit" as the "portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver."[21] The regulations apply the decisional unit concept to "reflect the process by which an employer chose certain employees for a [group termination] program and ruled out others from that program." Examples of decisional units recognized by the regulations include (a) facility-wide, (b) division-wide, (c) department-wide, (d) reporting lines and (e) job category.[22] A higher level review of termination decisions by human resources

personnel or inside legal counsel to monitor compliance with discrimination laws generally will not expand the size of the decisional unit.[23] However, a higher level review of termination decisions by management officials can expand the size of the decisional unit when such a review alters the scope or breadth of the decisional unit.[24]

In addition to satisfying the OWBPA's informational requirements, separation agreements containing ADEA waivers must be free from material misrepresentations that understate the impact of workforce reductions on older employees or overstate the impact of such programs on younger employees. Lastly, employers must advise employees aged 40 or over to consult with counsel and provide them with 45 days to consider the release and 7 days to revoke their acceptance.

NOW THAT YOU KNOW — KEY TAKEAWAY(S)

When considering or planning for a RIF, understanding and incorporating the additional considerations and timing requirements for employees who are 40 and older is essential to reduce legal liability. In addition, understanding the selection process in real time will make it easier to prepare the necessary disclosures and limit the need for returning to decision-makers to obtain the necessary information.

ISSUE #6 Additional Considerations

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

RIFs can implicate many employment laws and issues, not just the WARN and OWBP Acts. Employers must step back to evaluate what additional considerations apply to their workforce.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

Considerations for unionized employees. If unionized employees are selected for layoff, review applicable collective bargaining agreements for clauses governing selection procedures and recall rights. If the employer wishes to offer union employees the right to participate in a voluntary attrition program or to lay off unionized employees, the employer may have a duty to bargain with the union over certain aspects.

Potential immigration issues pertaining to laid-off employees. Employers should review employee records and Forms I-9 to determine whether any employees affected by an RIF are on temporary employment visas (*e.g.,* H-1B, L-1, E-1/E-2). Employees with a Permanent Resident Card (also known as an Alien Registration Receipt Card) or an Employment Authorization Card have unrestricted employment authorization and are not in the same situation as employees on temporary visas.

State-specific considerations. Some states require final payment within a certain specified period. In addition, many states require notification upon termination, even

when the WARN Act is not triggered. Lastly, some states have unique requirements for effectuating waivers of their state-specific laws and could prohibit the inclusion of certain provisions in any severance agreement.

NOW THAT YOU KNOW — KEY TAKEAWAY(S)

Regardless of the timeline for the restructuring initiative, it is critical to ensure that the various legal issues are evaluated and considered because the consequences of failing to plan accordingly could be significant. Without a proper plan and evaluation, a company could face a legal claim that would offset or dwarf any savings realized by a restructuring initiative. As in-house counsel, you are a vital key to the process by preparing for the issues that will likely arise throughout the process.

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[1] 29 U.S.C. § 2101(a)(1)(A).
[2] 20 C.F.R. §§ 639.3(e), (h).
[3] 20 C.F.R. § 639.3(h).
[4] 29 U.S.C. § 2101.
[5] *Id.*
[6] 20 C.F.R. § 639.5.
[7] *See UMW v. Martinka Coal Co.,* 202 F.3d 717, 722 (4th Cir. 2000).
[8] *Id.*
[9] 20 C.F.R. § 639.2.
[10] 20 C.F.R. § 639.7(a).
[11] 20 C.F.R. § 639.8.
[12] *Id.*
[13] *Id.*
[14] *See* 20 C.F.R. § 639.9.
[15] *Id.*
[16] 20 C.F.R. § 639.9(b).
[17] 20 C.F.R. § 639.9(a).
[18] 20 C.F.R. § 639.9(c).
[19] 29 U.S.C. § 2104.
[20] 29 C.F.R. § 1625.22(b)(4).
[21] 29 C.F.R. § 1625.22(f)(3)(i)(B).
[22] 29 C.F.R. § 1625.22(f)(3)(iii).
[23] 29 C.F.R. § 1625.22(f)(3)(vi)(A).
[24] 29 C.F.R. § 1625.22(f)(3)(vi)(B).