406 - Planning & Implementing Plant Closings or RIFs

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Faculty Biographies

Cathi Hunt

Cathi Hunt is associate general counsel for Progress Energy, a Fortune 250 diversified energy holding company headquartered in Raleigh, North Carolina. Progress Energy provides service to approximately 3.1 million customers in North Carolina, South Carolina and Florida. Ms. Hunt serves as employment and benefits law counsel to the company.

Prior to joining Progress Energy, she practiced with Cranfill, Sumner and Hartzog, LLP.

Ms. Hunt serves as a director on the board of Interact, a North Carolina domestic violence and sexual assault response agency. She also has served as a volunteer judge for Teen Court, a juvenile court diversion program. Together with her co-chair and committee, she designed the North Carolina Justice Teaching Institute and brought the Council for Civic Education's "We the People" constitutional law program under the umbrella of the North Carolina Bar Association. Ms. Hunt was recognized as an outstanding volunteer by the Wake County Volunteer Lawyers Program for other pro bono efforts.

Ms. Hunt received her B.A. from Reed College, her M.A., with honors, from the University of Melbourne in Australia and her J.D., cum laude, from Boston College Law School where she was an editor and author for the Boston College Third World Law Journal.

Maryrose Maness

Maryrose E. Maness is currently senior assistant general counsel for Altria Corporate Services, Inc. in New York. She is responsible for labor, employment and benefits. Ms. Maness also manages and leads lawyers in multiple practice areas including records management, IT, aviation, finance, facilities, risk management and data privacy.

Prior to joining Altria Corporate Services, Inc., Ms. Maness served as chief employment and labor council for Melville Corporation, helping to implement the board of directors' decision to break up the company. Before joining Melville Corporation, Ms. Maness worked with Philips Electronics North America Corporation.

Ms. Maness began her career in law with Grotta, Glassman and Hoffman (now known as Fox Rothschild), a boutique law firm specializing in labor and employment law. She is employment chair and vice president of the ACC's Greater New York Chapter. Ms. Maness has also served as a lecturer for the ACC and council on education in management.

Ms. Maness received her J.D. from Seton Hall School of Law.

Holly Silver

Holly Silver has worked as employment law counsel in three major corporations, and has an extensive knowledge of employment law issues in a corporate environment. Ms. Silver's most recent position was at Nestlé, where she served as senior counsel for Nestlé North America in the area of employment law. In her duties as senior counsel, she was responsible for all employment law issues for the company nationwide. Ms. Silver previously served as a senior attorney handling employment law advice and acted as trial counsel in the employment litigation area for Marriott Corporation.

Prior to joining Nestlé, Ms. Silver was senior counsel for McDonnell-Douglas Corporation, where she conducted oversight of employment litigation cases, and handled legal advice issues.

Ms. Silver has been a member of the board of directors of ACC's Southern California Chapter. She was on the board of directors and the executive committee of the Equal Employment Advisory Council in Washington D.C. for many years, and was the chair of the board of directors.

Ms. Silver graduated magna cum laude from Mount Holyoke College and received her J.D. from Georgetown University Law Center, where she was a member of Phi Delta Phi, legal honorary fraternity.

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CHECKLIST FOR DRAFTING RELEASES (ABRIDGED)

This document is intended to be a resource or guidance to assist in drafting releases that comply with applicable legal requirements. Legal developments occur regularly, and research may be necessary to determine whether all references in this document remain applicable.

GENERAL RELEASE GUIDANCE AND CONSIDERATIONS

! The release is understandable to the person signing it.

! The release is general, releasing all claims against the employer in exchange for the consideration provided.

! The consideration is something the releasor is not otherwise entitled to. It may be paid in a lump sum or paid over time. Payments over time may be linked to ongoing obligations such as consulting work.

Note: If payments are deferred or stretched too long, beware of unintended tax consequences under Section 409-a of the Internal Revenue Code.

Note: It may be prudent to allocate the consideration to various purposes, both for tax reasons, and because the employee may also make other commitments (e.g., a covenant not to compete) that require consideration.

! The release defines the parties released to include affiliated companies, officers, directors, agents, representatives, shareholders, and employees.

! The release specifies the claims released in general terms (unlawful discrimination claims, wrongful discharge, negligence, defamation, tort and contract claims, claims at common law and in equity, constitutional claims, etc.) in addition to listing employment statutes and claims.

! The release does ***not*** include claims that may not be released by statute or regulation. These commonly include claims under:

" The Fair Labor Standards Act, which requires Department of Labor (DOL) supervision

" Vested benefits under Employment Retirement Income Security Act (ERISA)

" Workers Compensation Claims (under most state laws)

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" Unemployment Compensation Claims (under most state laws)

Authorities: The issue of waiver of FMLA claims was in doubt but seems settled for now. *See*, *Faris v. Williams WPC-1 Inc.*, 332 F.3d 316, 319-22 (5th Cir. 2003), (DOL regulation 29 CFR applies only to current workers, not to former employees, and would not invalidate a release or promise not to sue made by a former employee). *See, also*, *Halvorson v. Boy Scouts of Am.,* 2000 WL 571933, *2-3 (6th Cir. May 3, 2000); *Schoenwald v. Arco Alaska, Inc.,* 1999 WL 685954 (9th Cir. August 30, 1999); *Riddell v. Med. Inter-Ins. Exch.,* 18 F.Supp.2d 468, 471 (D.N.J. 1998). Two decisions to the contrary have since been vacated, based on amicus briefs filed by the Department of Labor contending that those decisions misread the regulation is not settled. *See*, *Taylor v. Progress Energy Inc.*, 415 F.3d 364 (4th Cir. 2005), *rhrg granted and judgment vacated*, 2006 U.S. App. Lexis 15744 (4th Cir. June 14, 2006), *Dougherty v. Teva Pharm. USA*, 2006 WL 2529632 (E.D. Pa., August 29, 2006), *order vacated on reconsideration,* 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007).

Note: In *James v. Vernon Calhoun Packing Co.,* 498 S.W.2d 160, 162 (Tex. 1973), the court speculated but did not address whether requesting an individual to sign a release of claims that the employer knows or should know cannot be released could be actionable fraud.

! It may be necessary to "carve-out" or specifically identify certain claims that are not waived.

" The release may not prevent the individual from pursuing administrative remedies with government agencies. Many government agencies have the right to investigate potential statutory violations, regardless of whether the individual affected can maintain a claim on the individual's own behalf. This applies to most discrimination claims, and not just the Older Worker Benefit Protection Act (OWBPA) which specifically addresses this issue.

Authorities: *See* Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes, EEOC Notice 915.002 (4/10/1997); *U-Haul Company of California,* 347 NLRB No. 34 (2006)(finding mandatory arbitration agreement to be invalid because the breadth of the clause would lead reasonable employees to believe that they could not file administrative charges). There may other such claims under state laws. *See, e.g.*, *Edwards v. Arthur Andersen,* 142 Cal. App. 4th 603, 627-32, 47 Cal.Rptr.3d 788, 806-10 (August 30, 2006), *petition for review granted* November 29, 2006 (Employer must carve out employee's right to indemnity for necessary expenditures or losses, e.g., business expenses incurred on behalf of the company).

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- The release may not prevent the individual from filing a charge with the EEOC or participating in an EEOC investigation.
  - Note: The release may not prevent the individual from filing a charge with the EEOC nor require that a pending charge be withdrawn. Enforcement Guidance on non-waivable employee rights under EEOC enforced statutes, EEOC Notice 915.002 (4/10/97); *EEOC v. Astra USA, Inc.,* 94 F. 3d 738 (1st Cir. 1996); *EEOC v. Cosmair, Inc*., 821 F. 2d 1085 (5th Cir. 1987)(promise not to file charge with EEOC void as against public policy); *EEOC V. Lockheed Martin Corp.,* 444 F. Supp. 2d 414 (D.C. MD 8/8/06)(impermissible to require a person to withdraw her EEOC charge as a condition of receiving severance pay). *But see, EEOC v. Sundance Rehabilitation Corp*., 466 F.3d 490 (6th Cir. 10/24/06)(release not retaliatory on its face even though it contained ban on filing charge with EEOC).
  - The EEOC has challenged the representation that the individual has not filed charges, as facially retaliatory, in the District of Minnesota. *EEOC v. Land O' Lakes, Inc*., civil action no. 06-cv-3828 (9/25/2006)(ADM/JSM). Parties entered into Consent Decree 2/9/97 wherein, *inter alia*, Land O' Lakes agreed to cease using such language in future releases and to notificy employees who had signed releases containing such language since April 2004 that they have 300 days to file an EEOC charge.
  - A consent decree in *EEOC v. Eastman Kodak Company*, civil action no. 06-cv-6489 (W.D.N.Y. 10/11/06) contains language approved by the EEOC dealing with these issues:

    > Except as described below, you agree and covenant not to file any suit, charge or complaint against Releasees in any court or administrative agency, with regard to any claim, demand, liability or obligation arising out of your employment with Kodak or separation therefrom. You further represent that no claims, complaints, charges, or other proceedings are pending in any court, administrative agency, commission or other forum relating directing or indirectly to your employment by Kodak.
    >
    > Nothing in this Agreement shall be construed to prohibit you from filing a charge with or participating in any investigation or proceeding conducted by the EEOC or a comparable state or local agency. Notwithstanding the foregoing, you agree to waive your right to recover monetary damages in any charge, complaint, or lawsuit filed by you or by anyone else on your behalf."

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(Consider adding a reference to the NLRB because of the *U-Haul* decision cited above.)

- The release contains a non-admission clause, in which the employer denies liability and asserts that signing the release does not constitute an admission of liability.
- The release includes a choice of law that is relevant to the relationship of the parties.
- The release complies with state law requirements for releases. (Littler Mendelson has a state-by-state survey regarding state requirements.)
- The release is signed by the individual releasing claims and by a company representative, especially if the company is making any commitments, such as arbitration of disputes.
- The release includes standard clauses for modification, severability, complete agreement, headings, and subsequent use.

GENERAL RELEASE OPTIONS

- The release may include provisions for confidentiality, return of property and non-disparagement.

  Caution: Avoid mutual confidentiality or non-disparagement clauses, or carefully limit the persons bound by those clauses. Be sure that non-disparagement language can not be read as a limitation on employee's providing information to EEOC or other agencies.
- It is not clear whether a provision restricting future employment is retaliatory.

  See Jencks v. Modern Woodmen of Am., ___ F.3d ___ (10th Cir. No. 05-5130, March 19, 2007)(enforcing agreement to waive future employment is not unlawful retaliation). Rehire claims may be "inextricably linked to the claims of wrongful discharge that [the employee] expressly waived at the time of his termination," and therefore barred. *The Kellogg Company v. Sabhlok,* 471 F.3d 629, 634 (6th Cir. 2006) (release stated that company was not obligated to offer employment to the plaintiff if he reapplied). *See also, Blakeney v. Lomas Info. Sys.,* 65 F.3d 482, 485 (5th Cir. 1995).
- Consider arbitration or a jury waiver for disputes arising from the release. But beware of multiple forums, and consider this could affect the employer's ability to seek injunctive relief over a non-competition or similar provision.

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- The release may include an acknowledgement that the individual signing the release has received all compensation due.
- The release should include language that it is a binding and final.
- If the release is resolving a lawsuit, the release should include an agreement to file a Stipulation of Dismissal of the lawsuit or other appropriate document to resolve the lawsuit.
- The release may require the individual signing the release to cooperate with the employer and their attorneys in current or further litigation or other legal matters where the individual has knowledge of relevant facts. It may be appropriate to commit to reimbursing the individual for reasonable expenses.

TAX ISSUES ASSOCIATED WITH RELEASE OF EMPLOYMENT CLAIMS

- Payments received in relation to employment claims generally are taxable, 26 U.S.C. §61(a). Attorneys fees generally are taxable and income to the individual and the attorney. *Comm'r v. Banks*, 543 U.S. 426 (2005).
- Wages are subject to tax withholding, FICA and FUTA tax. Wages include most back pay, settlement, separation and severance payments. IRS Regulations §31.3401(a)-1 (income tax), §31.3121(a)-1 (FICA). Wages must reported on a W-2 form.
- Emotional distress damages, attorneys fees and interest, and liquidated damages are not wages. Non-wage taxable income of more than $600 must be reported on a Form 1099 Misc. Attorneys fees must be reported as income to the individual but generally will be deductible to the individual. *See* Section 703 of the Job Creations Act of 2004. The amount of attorneys fees also should be reported to the attorney on Form 1099 Misc. resulting in a double reporting for the amount of the attorneys fees (reported both to the individual and the attorney). Payments made the subject of a Form 1099 Misc. form are subject to backup withholding unless the recipient provides a signed form W-9.
- There is a pending issue as to what extent, if any, payments for emotional distress may be taxed, unless the payment is for personal injury. *See* 29 U.S.C. §104(a)(2); Murphy v. IRS, 460 F.3d 79 (D.D.C. 2006) (holding taxation of judgment for emotional distress to be unconstitutional), vacated by 2006 U.S. App. 32293 (oral rehearing April 23, 2007)
- The parties may consider allocating payments to the individual signing the release to reasonable elements of recovery that are not wages to the individual. This may include non-wage items such as attorneys fees and emotional distress.

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IF THE INDIVIDUAL SIGNING THE RELEASE IS AGE 40 OR OVER, THE OLDER WORKER BENEFIT PROTECTION ACT AND ASSOCIATED REGULATIONS REQUIRE THE FOLLOWING:

- The release is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.

  Statute: 29 USC § 626(f)(1)(A)

  Regulation: 29 CFR § 1625.22(b)(1) to (4)

- The release specifically refers to rights or claims arising under the ADEA.

  Statute: 29 USC. § 626(f)(1)(B)

  Regulation: 29 CFR § 1625.22(b)(6)

- The individual signing the release does not waive rights or claims that may arise after the date the waiver is executed.

  Statute: 29 U.S.C. § 626(f)(1)(C)

  Regulation: 29 CFR § 1625.22(c)

- The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.

  Statute: 29 U.S.C. § 626(f)(1)(D)

  Regulation: 29 CFR § 1625.22(d)

- The individual is advised in writing to consult with an attorney prior to executing the agreement.

  Statute: 29 U.S.C. § 626(f)(1)(E).

  Regulation: 29 CFR § 1625.22(b)(7)

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See Cole v. Gaming Entertainment, L.L.C., 199 F.Supp. 2d 208, 214 (D. Del. 2002) (holding language reciting that "[e]mployee acknowledges that he/she has been advised to consult with an attorney prior to executing this Agreement" was insufficient to meet statutory requirement that employer must advise employee in writing to consult an attorney prior to signing the waiver).

! The release provides the required time for consideration of the release: 21 days for the individual to consider before signing or 45 days in the case of a "exit incentive or other employment termination program."

Statute: 29 U.S.C. § 626(f)(1)(F)

Regulation: 29 CFR § 1625.22(e)(3), (4), and (6)

The definitions of the two programs are provided at 29 CFR § 1625.22(f)(1) (iii)

> (A) . . . Usually an "exit incentive program" is a voluntary program offered to a group or class of employees where such employees are offered consideration in addition to anything of value to which the individuals are already entitled (hereinafter in this section, "additional consideration") in exchange for their decision to resign voluntarily and sign a waiver. Usually "other employment termination program" refers to a group or class of employees who were involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver.
>
> (B) The question of the existence of a "program" will be decided based upon the facts and circumstances of each case. A "program" exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to *two or more* employees. *Typically*, an involuntary termination program is a *standardized* formula or package of benefits that is available to two or more employees, while an exit incentive program *typically* is a *standardized* formula or package of benefits designed to induce employees to sever their employment voluntarily. In both cases, the terms of the programs generally are not subject to negotiation between the parties. [Emphasis added.]

Note: It also may be prudent to secure agreement that there was no coercion or additional benefits if the employee returns the release before the end of the allotted period.

! A release included in a settlement of a charge of discrimination with the EEOC or a lawsuit need only provide a "reasonable" time and not necessarily 21/45 days for consideration. It is recommended that the release of a legal claim provide for at least 21 days to consider.

Statute: 29 U.S.C. § 626(f)(2)

Regulation: 29 CFR § 1625.22(g)(4) – (6)

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! The release allows seven days for revocation and provides that the agreement does not become effective or enforceable until the seven day period has expired.

Statute: 29 U.S.C. § 626(f)(1)(G)

Regulation: 29 CFR § 1625.22(e)(2) and (5)

Note: There sometimes can be confusion over whether the signer revoked the release. Include details on when and how the revocation must be received.

! The parties agree that immaterial or material changes do not restart the running of the applicable 21 day or 45 day consideration period.

Statute: 29 U.S.C. § 626(f)(1)(F)

Regulation: 29 CFR § 1625.22(e)(4)

! If the release is part of an exit incentive or employee termination program, the employer provides the required informational material.

If there is an employment termination program, the employer must give 45 days to consider the release and provide:

" The class, unit, or group of individuals covered (such as the accounting department, or all employees of the company).
" Eligibility factors for the program (i.e., how employees are selected for RIF such as by volunteering, or if involuntary, by job skills, seniority, performance, or whatever other factors).
" Time limits applicable to the program (this could be time limits applicable to consideration of a voluntary incentive and the release).
" An age impact list listing all of those eligible for the program (i.e., those selected for RIF and who will receive benefits) and those who are not (not selected, or selected and not eligible for some reason) by position and age (not by name).

Statute: 29 U.S.C. § 626(f)(1)(H)

Regulation: 29 CFR § 1625.22(f)

The Decisional Unit

Required information must be given to each person in the "decisional unit" if there is an employee termination program. The decisional unit determination usually is difficult. *See, e.g., Pagliolo v. Guidant Corp.* 2007 WL 1040869 (D. Minn. 06-943, April 4, 2007).

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Regulation: 29 CFR § 1625.22(f)

Note: There is substantial concern about under-inclusion and over-inclusion of information on the decisional unit included in the age impact list. Just providing general workforce statistics (if it is a company-wide RIF) could conceal discrimination in a department. Moreover, including only department information could conceal unlawful discrimination in the entire RIF process. Failure to include the proper decisional unit can invalidate the release. *Id.* See, also, *Kruchowski v. Weyerhaeuser Company*, 446 F.3d 1090 (10th Cir. 2006) (invalidating release because employer included individuals on the age impact list that the plaintiff's decision-maker did not supervise and were not in the decisional unit).

Consider whether employees working in other countries should be included in the decisional unit provided in the age impact list.

Eligibility Factors

The statute and regulations require the employer to list the eligibility factors for the group termination program. A section from the regulations on the appropriate "decisional unit" refers to eligibility factors and lends further support for these types of factors as being the type of factors required by the regulations (do not list age, however).

Regulation: 29 CFR § 1625.22(f)(3)(ii)(E)

Likewise, if the employer analyzes its operations at several facilities, specifically considers and *compares ages, seniority rosters, or similar factors at differing facilities*, and determines to focus its workforce reduction at a particular facility, then by the nature of that employer's decision-making process the decisional unit would include all considered facilities and not just the facility selected for the reductions.

Note: There is a substantial concern in providing the criteria for selection that the criteria be accurate but somewhat general. Descriptive terms such as "seniority," "job skills," "performance," and "organizational needs" will be most appropriate in typical situations.

See *Kruchowski v. The Weyerhaeuser Company*, 423 F.3d 1139 (10th Cir. 2005)(*Weyerhaeuser I*)(Release invalid to waive age discrimination claims because employer failed to identify the eligibility factors – leadership, abilities, technical skills, and behavior of each employee and whether each employee's skills matched defendant's business needs – that it used to select employees for the

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layoff). The Court of Appeals withdrew this decision and replaced it with a decision that decided the case on other grounds. 446 F.3d 1090 (10th Cir. 2006)(*Weyerhaeuser II*)(deciding the case based on the decisional unit). This does not mean, however, that the reasoning of *Weyerhaeuser I* necessarily is invalid

Time Limits

Must an employer give 21/45 days notice for an individual to decide whether or not to resign or accept a voluntary exit incentive program; or must the employer only provide 21/45 days to consider the waiver applicable to the decision? *Compare Blackwell v. Cole Taylor Bank,* 1997 U.S. Dist. Lexis 17083 (N.D. Ill. 1997), *reversed on other grounds,* 152 F.3d 666 (7th Cir. 1998), (employer did not have to provide the 21/45 days to decide whether or not to resign provided that the employer provided the appropriate time to consider whether or not to sign the waiver), *with EEOC v. Sears*, 857 F. Supp. 1233 (N.D. Ill. 1994), (holding that the term "agreement" in the OWBPA encompassed both the decision to resign and the decision to sign the waiver, and the employer had to provide the statutory time for both the decision to resign and the decision to sign the waiver).

Age Impact List

The age impact list should be comprised of two lists, one for those eligible for the termination program and one for those ineligible for the termination program. The company should not list individuals by name, but by job title with ages.

Regulation: 29 CFR § 1625.22(f)

Note: It may be necessary to distinguish the reasons that some individuals are listed on the age impact list, depending on whether the person volunteered for the RIF or the company selected that person. *Cf. Pagliolo, supra.*

Regulation: 29 CFR § 1625.22(f)(4)

Note: Decisions on selection for a RIF may change as the RIF proceeds. If age information changes, the employer need not provide corrected information to individuals already terminated; but it must provide updated statistics on those who are eligible and ineligible for the program to persons offered the release later.

Regulation: 29 CFR § 1625.22(f)(4)

Caution: Generally, the employer has one opportunity to provide correct statistics and if the employer provided materially incorrect information, that could

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invalidate an otherwise valid release. *See Butcher v. Gerber Products Company*, 8 F.Supp 2d 307 (S.D.N.Y. 1998).

The regulations provide a sample presentation of the decisional unit information for an age impact list.

Regulation: 29 CFR § 1625.22(f)(4)

! A waiver agreement cannot restrict the individual from waiving the right to file a charge of discrimination with the Equal Employment Opportunity Commission or participate in an investigation conducted by the EEOC.

Statute: 29 U.S.C. § 626(f)(4)

Regulation: 29 CFR § 1625.22(i)

! Any restrictions on making claims must be sufficiently limited. A requirement to tender back consideration is prohibited. The waiver agreement also may not prevent retention of consideration as a condition to asserting a claim.

Regulation: 29 CFR § 1625.23(a)

See *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998)(An individual is not required to tender back consideration for a release in order to purse an age discrimination claim).

Note: The prohibition is not just limited to filing a lawsuit or a charge with the EEOC; it also prohibits assertion of claim before a local or state agency.

! The waiver agreement may not impose a condition precedent on pursuing a claim.

Regulation: 29 CFR § 1625.23(b)

! The waiver agreement may provide for limited set off or recoupment of consideration if the individual prevails in an age discrimination claim.

Regulation: 29 CFR § 1625.23(c)

Note: The recoupment can only apply on an individual-by-individual basis. In addition, an employer must honor its obligations under a waiver agreement even if another claimant is successful in challenging the release.

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Regulation: 29 CFR § 1625.23(d)

! The release sufficiently distinguishes the restrictions applicable to the covenant not to sue from the claims released. Some lawyers will decide not to include a covenant not to sue at all. If included, the covenant not to sue should be appropriately limited.

Cases: *Thomforde v. IBM Corporation,* 406 F.3d 500 (8th Cir. 2005)(release invalid to waive ADEA claim because it did not sufficiently distinguish the limitations on the covenant not to sue required by the OWBPA from the general release of claims). *See also, Syverson v. IBM Corp.*, 472 F.3d 1072(9th Cir. 2007).

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Criteria

Make selection standard very clear to management

- i.e., those best qualified to perform remaining work
  - Normally used for non-union employees/managers
  - No pre-selection "lists"
  - Reassure management that the best will rise to the top

Criteria (cont.)

- Establish Criteria
  - Definitions need to be clearly understood by management
  - Management/non management criteria should be considered
  - Plan legal defenses during criteria development

Criteria (cont.)

- Permissible/Impermissible Criteria List
  - Examples – Permissible
    - Functional/technical skills
    - Communication
    - Teamwork
    - Leadership
    - Task achievement skills
    - Past performance reviews

Criteria (cont.)

- Permissible/Impermissible Selection Criteria List
  - Examples – Impermissible
    - Protected classes
    - Proximity to retirement
    - Outstanding claims
    - Leave status
    - Protected conduct – i.e., Whistleblower

Criteria (cont.)

- Weighting of criteria is defensible
  - i.e., last two performance reviews 25% each
  - 50% for specific criteria discussed supra
- Interviews can be legally risky if the person is currently performing the position
  - For new positions, if interviews are absolutely required by management, use objective interview instruments and give a weight on criteria form

Documentation

- Comparative ranking
- Highest ranked retained
- Exceptions should be extremely limited
  - i.e., geographic
- Have backup documentation
- Accuracy is critical
  - Check it, check it, check it

Documentation (cont.)

- Have a separate form for Legal
  - Privileged
  - Covers protected classes
  - Major dates (i.e., retirement vesting)
  - Outstanding claims
  - Leave status

Reorganization Principles

- Incumbents
  - Highly risky to "bump" incumbents
- Temps
  - Temps should be let go before employees displaced
- Relocation
  - Complicates process
  - General decision by classification rather than by individual
  - Get preliminary showing of advance interest

Reorganization Principles (cont.)

- Demotions
  - Can increase potential liability
  - Demoted person many times does not adjust
  - Remember to individually analyze individual for each job
  - Determine in advance demotion salary and perq availability

Reorganization Principles (cont.)

- Hiring Bars
  - Good rule of thumb is one year for positions being displaced
- Volunteers
  - Excellent way to reduce hardship and liability
  - Employer keeps final decision rights

Reorganization Principles (cont.)

- Timing
  - Make sure you give yourself enough time
  - Agree on a time line in advance with management
- Promotions
  - Promoting someone into a position for which a displaced employee is eligible is extremely difficult to defend

Reorganization Principles (cont.)

- Document Retention
  - It is a good idea to keep drafts of the ranking forms
  - To avoid multiple drafts, consider editing original document and do <u>one</u> final

Legal Review

- Disparate Impact
  - This analysis should be done first so categories of disparate impact can be considered in the disparate treatment analysis
- Disparate Treatment
  - Color coding
    - Red – major problem should be fixed
    - Yellow – possible problem
    - Litigation Yellow – will likely end up in litigation but defensible
    - Green – no unusual issues

Legal Review (cont.)

- "Chicken Little Syndrome"
  - Limit "Reds" to as few as possible so they get fixed
  - Almost every employee is "protected" somehow
  - If good rationale with supporting documentation, give a "Green" unless another factor present (i.e., disparate impact for protected category; double category protection)
  - Make sure management knows "Green" means no unusual issues

Legal Review (cont.)

- Too good/bad to be true
- Is it defensible?
- Jury sympathetic cases

WARN Act

- When in doubt, give notice
- If constant layoffs, consider notice in lieu of aggregation
- Use the few employer tools
  - 14 day window
  - 59 day extension

WARN Act (cont.)

- Be prepared for dates/numbers to change at the last minute
- Remember – closing of department can equate to a plant closure

Why offer a severance package?

- Minimize risk of legal claims
- Minimize "disgruntled conduct"
- Improve morale/ retention of retained employees
- Minimize negative recruiting implications
- Reduce negative publicity

The Goal:

- Structure program to achieve desired results
- Avoid unintended negative consequences such as:
  - ERISA or contract claims for benefits under pre-existing program or ERISA plan that offered greater benefits than newly created plan
  - ERISA claims for arbitrary denial of benefits
  - Claims for benefits under multiple programs or agreements
  - IRS penalties for claimed § 409A violations

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Step One: Analyze existing plans, policies, agreements, practices

1. Does it apply?
2. Is it desirable?
3. Is it legally compliant?
4. If answer to # 2 and/or #3 is NO, how can you change it?

Existing Programs

- Employee handbook/manual
- Benefit plan documents
- Employment agreements
- Collective bargaining agreements
- Past occurrences

Step Two: Analyze ERISA Issues

1. Is existing plan, program, policy or practice covered by ERISA?
2. If so, is it ERISA-compliant?
3. If not, what are your options?
4. If no existing obligation, do you want to create an ERISA-covered plan or non-covered program?

ERISA Coverage Test

- Any "plan, fund or program... established or maintained…for the purpose of providing" certain benefits [including severance]
- Is it a "plan"?
  - More than one-time, lump sum payment triggered by single event not anticipated to recur
  - Requires an "ongoing administrative scheme"

Factors in determination of "ongoing administrative scheme"

- Types of payments (lump sum, periodic, alternative forms)
- Amount of discretion and individualized analysis required in determining eligibility or benefits
- Period of time over which benefits paid
- Generally available from time to time or specific to particular event
- Need for ongoing monitoring/recordkeeping/ financial coordination

ERISA Welfare Plans vs. Pension Plans

- Eligibility not conditioned on retirement
- No age or service requirements
- Total payments do not exceed two times employee's annual compensation
- Payments generally completed within 24 months

Implications of ERISA Welfare-Plan Coverage

- Annual 5500 Form filing
- Written plan document including claims procedure
- Summary Plan Description
- Summary Annual Report

Step Three: Select an Option

#1: Amend or terminate existing plan before RIF announcement

#2: Create new ERISA Plan, superseding prior plans and practices

#3: Create a non-ERISA program

Advantages of an ERISA Plan

- Exclusive remedy/preempts state law claims
- Administrative remedy exhaustion required
- Adjudication by judges, not juries
- Decisions reviewed under limited "abuse of discretion" standard (if plan drafted to provide administrator discretion)
- Internal and external clarity/credibility of eligibility standards

Disadvantages of ERISA Plan

- Legal entitlement in future situations
- Employee expectation in future situations
- Administrative scheme required

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Step Four: Consider IRC § 409A Issues

- Applies to deferred compensation arrangements, which may include severance plans or agreements
- Imposes strict limitations on timing and manner of payments and ability to change form of payment
- Several exceptions may apply (including collectively-bargained plans and payments below certain amounts)
- Noncompliance risk: additional taxes, interest and a 20% surtax
- Most significant issues concern payments to high-level executives in public companies (no payments for at least 6 months after separation)

Step Five: Decide on Components of Severance Package

- Severance payment: lump sum or installment? One formula or multiple?
- Pension vesting and/or age/service credit
- Continued health insurance coverage/waiver of COBRA premiums
- Outplacement assistance
- Relocation assistance

Components of Package (cont'd)

- Training/education assistance
- Retention bonus
- Company car/equipment purchase
- Early stock option vesting and/or cash payment in lieu of unvested
- Cash payments in lieu of incentive comp. awards

Step Six: Structure the Program

- Clearly define eligible vs. ineligible categories (contractors, temps, part-timers)
- Clearly define triggering events vs. excluded events
- Clearly define conditions precedent to receiving (release(s), no revocation, employment on triggering date)

Structuring the Program (cont'd)

- Decide on payment formula(e):
  - X weeks/year of service
  - Add-on for certain job levels
  - Add-on for salary over certain level
  - Minimums and/or Caps (e.g., 2-week minimum, 30-week or dollar amount cap)
  - Application to partial year's service, LOA

Structuring the Program (cont'd)

- Reserve discretion to amend, terminate, provide additional benefits
- Reserve administrator discretion to make eligibility decisions
- Clearly define any benefit continuation terms (e.g., continued plan coverage vs. COBRA, employee contribution)
- Consider including agreement/reaffirmation of confidentiality, non-compete or non-solicitation obligations

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Structuring the Program (cont'd)

- Provide for forfeiture/recovery of payments for beneficiary breaches of obligations (e.g., non-compete)
- Describe effect of reemployment or death during payment period
- Include clear statement that prior arrangements/agreements are superseded
- Define relationship to any WARN pay

Structuring Program (cont'd)

- Include employment-at-will language
- Include appropriate § 409A language:
  - ✓ No payments to "specified employees" before 6 months after separation or earlier death
  - ✓ Any provisions inconsistent with § 409A are void and without effect
  - ✓ May amend, suspend or terminate plan if necessary to comply

Step Seven: Develop Communication Strategies

- Centralized approval of all communications
- Ensure consistency in all messages
- Include language deferring to Plan
- Prepare summary handout and/or FAQ sheet
- Provide individual formula calculation sheet
- Offer retirement-planning seminars
- Set up Help Line for questions

Why Require a Release?

- Purpose –
  proactively manage potential litigation
  - Most federal / state law claims can be waived
    - Consistent with public policy favoring conciliation of employment disputes
  - Most common type of alleged discrimination in RIF context is age discrimination

Test for Valid Release of Claims

Release must be "Knowing and Voluntary"

- Release must be written in plain language
  - "Written in language calculated to be understandable to the employee or an average individual eligible for RIF."
  - If employee must ask what the language means, it is indication that the release "is not written in a manner calculated to be understood."

    Thomforde v. I.B.M., 406 F.3d 500 (8th Cir. 2005)
- Release must limit or eliminate technical jargon

Test for Valid Release of Claims (cont.)

- Factors that may be relevant to determine whether waiver was knowing and voluntary:
  1. Employee's level of education and business sophistication
  2. Roles of the parties in setting the terms of the wavier
  3. Clarity of the waiver
  4. Time given to the employee to review the terms
  5. Whether the employee had legal or other independent advice
  6. The consideration given in exchange for the waiver

  See, e.g. Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9 (1st Cir. 1997).

Requirements for ADEA Release

- Eight requirements to release age discrimination claims under OWBPA:
  1. Release is written in simple English
  2. Release refers expressly to the ADEA
  3. Release extends only to claims arising before the release is executed
  4. Release is offered in exchange for something of value not already owed to employee
  5. Employee is advised, in writing, to consult with an attorney

Requirements for ADEA Release (cont.)

6. Employee is given 45 days to review the agreement (including disclosure statement) before signature is required
7. Employee receives valid OWBPA disclosure statement
8. Employee is provided at least seven days to revoke agreement after signature

- Failure to satisfy any of the criteria will result in an invalid release

OWBPA Disclosure Statement

- OWBPA Disclosure Statement includes:
  1. The groups of employees eligible to receive severance (by class, unit or group)
  2. Any eligibility requirements
  3. Any time limitations
  4. The job titles and ages of all the selected and non-selected employees in the decisional unit

OWBPA Disclosure – Decisional Unit

- Decisional Unit:
  - Significant decision because –
    - Can invalidate ADEA waiver
    - Difficult to determine appropriate decisional unit
    - Must not mislead, misinform or fail to provide useful information
  - Options include: facility, division, department, reporting relationship and job categories

OWBPA Disclosures in Rolling RIFs

Rolling RIF:

involuntary terminations in decisional unit occur in successive increments over a period of time

OWBPA Disclosures in Rolling RIFs

- Employer required to provide later terminated employees with cumulative age and job title/category information for all selected and non-selected employees in the unit
- No need to provide updated supplemental disclosures to employees terminated earlier provided original disclosure was accurate at the time given

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OWBPA Disclosures in Rolling RIFs

- Two Options:
  1. In initial disclosure, include everyone anticipated to be terminated
     - No need to provide supplemental disclosure
  2. Amend the disclosure over time to provide updated information on an ongoing basis
     - Provide updated disclosures only to those who have not yet signed a release

Include OWBPA Requirements in All Releases?

- ADEA and OWBPA apply only to employees age 40 and older

Option 1: two separate releases -- one for employees at or over age 40 and another for those under 40.

Option 2: one release with the same language for all employees regardless of age.

Effect of Invalid ADEA Waiver – Tender Back

- No tender back – Employee alleging that a waiver was not knowing or voluntary does not have to return severance benefits to file an ADEA claim
- But, outside ADEA and OWBPA, employer may include tender back provision for other portions of release such as disclosure of confidential information, non-disparagement, non-solicitation.

  See e.g., Davis v. Eastman Kodak Co., 2007 U.S. Dist. LEXIS 23193, at *17 (W.D.N.Y. Mar. 29, 2007)

Effect of Invalid ADEA Waiver – Other Claims

- Even if release fails to satisfy all OWBPA requirements, it may still be a valid waiver of other claims

  See, e.g., Williams v. Phillips Petroleum Co., 23 F.3d 930 (5th Cir. 1994), *cert. denied*, 513 U.S. 1019 (1994); *Tung v. Texaco Inc.*, 150 F.3d 206 (2d Cir. 1998)

ADEA Releases – Burden of Proof

- Burden of Proof:
  - Under OWBPA, the burden of proving the validity of a release is always on the employer.

    See 29 U.S.C. § 626(f)(3); *Syverson v. I.B.M.*, 472 F.3d 1072 (9th Cir. 2007).
  - If release fails to meet any one of the requirements of the OWBPA or ADEA, it is invalid and unenforceable as it applies to ADEA or OWBPA claim.
    See 29 U.S.C. § 626(f).

Waiver of Other Specific Claims

- Can Family and Medical Leave Act claims be waived?
  - Employee can waive claims already accrued under the FMLA. *See Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003); *Dougherty v. TEVA Pharms. USA, Inc.*, 2007 U.S. Dist. LEXIS 27200 (E.D. Pa. Apr. 9, 2007).
  - Employee cannot waive, and employer cannot induce the waiver of, retrospective (already accrued) FMLA claims. *See Taylor v. Progress Energy*, 2007 U.S. App. LEXIS 15846 (4th Cir. July 3, 2007).

Waiver of Other Claims (cont.)

- Employee Cannot Waive:
  - FLSA – can waive only with D.O.L. approval
  - Vested benefits under ERISA
  - Right to file a charge with the NLRB
  - Wages earned
  - Some state law claims such as workers compensation benefits and unemployment benefits

Waiver of Other Claims (cont.)

- Employee Cannot Waive:
  - Right to file an EEOC charge
  - Right to participate in investigation and proceedings conducted by EEOC
- Employee Can waive:
  - Right to recover based on EEOC charge filed against employer
  - Right to recover in a suit brought by EEOC on employee's behalf

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State Law Release Requirements

- Many state law requirements for valid waiver of claims
- California requires:
  - Release of unknown claims must be made knowingly
    - Express waiver of the protection of Cal. Civ. Code § 1542, which states:

      "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

Drafting Releases: WATCH FOR...

- Summary of Considerations in Drafting a Release:
  - Watch for language that could be interpreted to preclude an employee from filing an EEOC charge or assisting the EEOC in investigating or pursuing a charge.
    - Some courts have invalidated an entire release where it attempts to block the filing of an EEOC charge. *EEOC v. Land O'Lakes Inc.*, 2007 U.S. Dist. LEXIS 48148 (D. Minn. Feb. 9, 2007); *EEOC v. Eastman Kodak Co.*, No. 06 CV 6489 CJS(F), 2006 U.S. Dist. LEXIS 96433 (W.D.N.Y. Oct. 6, 2006).
    - At least one court has struck the offending clause without invalidating the remainder of the release. *EEOC v. SunDance Rehabilitation Corp.*, 466 F.3d 490 (6th Cir. 2006).

Drafting Releases: WATCH FOR... (cont.)

- Watch for any requirement that an employee withdraw a charge already filed with the EEOC, as release may be found retaliatory and unenforceable.

  U.S. EEOC v. Lockheed Martin Corp., 444 F. Supp.2d 414 (D. Md. 2006)

Drafting Releases: WATCH FOR... (cont.)

- Include a severability clause
  - In view of decisions invalidating releases as to ADEA, Title VII and FMLA claims, important to include a severability clause in release stating that if one portion of the agreement is void and unenforceable, remainder remains intact.

    EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085 (5th Cir. 1987); *U.S. EEOC v. Lockheed Martin Corp.*, 444 F.Supp.2d 414 (D. Md. 2006)

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Drafting Releases: WATCH FOR... (cont.)

- Watch for language that could result in argument that release was not drafted in manner reasonably calculated to be understood by terminated employee or an average employee eligible for the RIF
  - Pay particular attention to explanation of the difference between release and a covenant not to sue and separation of the provisions
    Thomforde v. IBM, 406 F.3d 500 (8th Cir. 2005)
  - Likewise, if release is not clear about which claims the employee is releasing and which the employee retains, the waiver will be void and unenforceable.
    Syverson v. IBM, 472 F.3d 1072 (9th Cir. 2007).

Drafting Releases: WATCH FOR... (cont.)

- Check for prior existing agreements
  - Integration/Merger Clause – before including language stating that the release is the entire agreement between parties and other agreements are superseded, null and void, determine if non-disclosure, confidentiality or other agreements between employer and employee exist
    - Expressly preserve any prior agreements employer wishes to retain and attach them to the release
    - Expressly declare null and void all other agreements.

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Sample Severance Releases Available From the ACC Virtual Library*

1. Severance Agreement and Mutual Release of All Claims (2007)
   www.acc.com/resource/getfile.php?id=8549
   - Intended to apply to employees age 40 and older.
   - Includes California Section 1542 language.

2. Separation Agreement and General Release (2005)
   www.acc.com/resource/getfile.php?id=5498
   - Intended to cover employees age 40 and older.

3. Severance Agreement and Release of All Claims (2004)
   www.acc.com/resource/getfile.php?id=5496
   - Intended to apply to employees age 40 and older.
   - Includes California Section 1542 language.

4. Separation Agreement for Employees Age 40 or Older
   www.acc.com/resource/getfile.php?id=3360
   - Exhibit 1 to "Layoffs, Downsizing, and RIFs: How to Do Them Right," ACCA Annual Meeting 2002
   - Includes OWBPA disclosure

* Note that for a reduction in force, the first three releases referenced above should be modified to indicate a 45-day consideration period rather than a 21-day consideration period.

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PLANNING & IMPLEMENTING PLANT CLOSINGS OR RIFS[1]

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I. INTRODUCTION

The Bureau of Labor Statistics reports that mass layoff events have leveled off since a high of 21,467 events and 2,514,862 claims for unemployment insurance in 2005.[2] The 13,998 total number of mass layoff events in 2006 was the lowest number reported for any year since 1996. Nevertheless, due to the competitive marketplace, continued automation of jobs, searches for efficiencies in the manner to perform work, shareholder expectations of company profit, and continued cost elimination by utilizing overseas workforces, corporations have been driven to sever thousands of employees who, in turn, compete for fewer jobs.

These current economic realities make it likely that even the most stable and conservative

[1] This content of this paper is largely taken from the article "Risk Management Guidance for Employers Conducting a Reduction in Force" authored by Melinda Burrows and published in 49 Prac. Law. No. 2 (2003) and 49 Prac. Law. No. 3 (2003). Ms. Burrows has kindly granted the authors permission to utilize her article for this paper.

[2] As described by the Worker Adjustment and Retraining Notification Act ("WARN"), a mass layoff event occurs when at least 33% and 50 of the full-time, active employees at a single site of employment experience loss of employment within a 30 or 90 day period. A mass layoff event also occurs when 500 or more full-time employees at a single site of employment experience loss of employment within a 30 or 90 day period, even where those employees represent less than one-third of employees working at the site.

The information contained in this paper provides general suggestions for handling employment-related issues; however, it is not intended to provide legal advice or services. You should consult with legal counsel for advice as appropriate when specific legal issues arise.

employer may need to consider a workforce reduction in order to survive. Employers considering a reduction in force (RIF) face numerous challenges, the most significant of which is ensuring that their post-RIF labor cost savings are not offset by the costs associated with claims brought by displaced workers. This paper will discuss a number of potential legal risks associated with RIFs and ways in which downsizing employers can manage around those risks. As is the case with nearly all litigation, while it may be impossible to prevent the claims from being filed, it *is* possible to position oneself to be able to defend against the charges when they come.

II. COMMON RISKS ARISING OUT OF RIFS

While most U.S. jurisdictions follow the "employment at will" doctrine, this doctrine may provide little protection when a poorly planned RIF is challenged. In general, while the employment at will doctrine allows an employer to take adverse employment action against an employee for any reason or no reason at all, a RIF may nonetheless result in liability for an employer if its selection process is found to violate federal, state or local laws, regulations or public policy. Before even contemplating a RIF, it is important for employers to appreciate the common legal theories used by outplaced employees challenging their terminations.

A. Anti-Discrimination Laws

Numerous federal, state and local statutory and regulatory schemes prohibit employment discrimination against members of certain demographic groups. Federal statutes prohibit discrimination on the basis of race, gender, alienage/national origin and religious preference (Title VII, 42 U.S.C. §§ 2000e *et seq.*), and age (the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*), in addition to veteran status (the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301 *et seq.*), disabled

veteran status, 38 U.S.C. § 4313(a)(3) and disability (the Americans with Disabilities Act ("ADA") 42 U.S.C. § 12111). State and local regulations also may prohibit discrimination against these and other groups, for example, discrimination on the basis of sexual orientation, *Quinn v. Nassau County Police Dept.*, 53 F. Supp.2d 347 (E.D.N.Y. 1999) citing *Romer v. Evans*, 517 U.S. 620 (1996), or on the basis of parental status, *see Schafer v. Board of Public Educ. Of School Dist.*, 903 F.2d 243 (3d Cir. 1990).

Under Title VII, courts consistently have held that any form of discrimination based on race, gender, alienage/national origin or religious preference is prohibited, even if the discrimination is against a member of a majority group and is to the benefit of a protected class member (so-called reverse discrimination claims). *See, e.g., Hopp v. City of Pittsburgh*, 194 F.3d 434 (3d Cir. 1999). Although the case law is clear on the fact that persons under the age of 40 are not protected by the ADEA, several jurisdictions permit state law claims for age discrimination arising out of preferential treatment for older workers. *See, e.g., Bergen Commercial Bank v. Sisler*, 157 N.J. 188 (1999).

Outplaced employees may bring a discrimination claim under one of two theories: disparate impact or disparate treatment. Under a disparate impact theory, a downsizing employer may be held liable under anti-discrimination laws for using neutral selection criteria that result in a disproportionate number of employees from a protected group being outplaced. *Cf., Bartz v. Agway, Inc.*, 844 F. Supp. 106 (N.D.N.Y. 1994). Outplaced employees can establish a *prima facie* disparate impact case in several ways. Some courts have held that an employee may prove disparate impact by demonstrating a difference of two standard deviations between the percentage of outplaced employees in the protected class and the percentage of outplaced employees in the impacted workforce prior to the RIF. *See Frazier v. Garrison I.S.D.*, 980 F.2d

1514 (5th Cir. 1993) (for a more in-depth explanation of the two standard deviation rule, see *Castaneda v. Partida*, 430 U.S. 482 (1977)). However, the courts have not established a bright line rule for statistically proving or disproving discrimination, and while a difference of two standard deviations may indicate disparate impact, it is not dispositive. *Rendon v. AT&T Technologies*, 883 F.2d 388 (5th Cir. 1989) (referencing *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977 (1988)). Case-by-case analysis is important, as the determination of whether discrimination exists is driven by the specific factual situation. *Id.*

Alternatively, an employee may establish a disparate impact case using the EEOC's "four-fifths rule":

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.

29 C.F.R. § 1607.4D. Once a *prima facie* disparate impact case is made, an employer must demonstrate that the selection criteria are job-related and consistent with business necessity. 42 U.S.C. § 2000e-2(k); *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Stewart v. City of St. Louis*, No. 4:04CV00885, 2007 U.S. Dist. LEXIS 38473, at *22 (E.D. Mo. May 25, 2007). The U.S. Supreme Court recently held that a disparate impact claim is permitted under the ADEA. *Smith v. City of Jackson*, 544 U.S. 228 (2005). However, both the ADEA and Title VII expressly disallow disparate impact claims when selection decisions are based on seniority. 29 U.S.C. § 623(f)(2); 42 U.S.C. § 2000e-2(h).

An employer can avoid liability from anti-discrimination laws by proving that the disproportionate impact resulted from business necessity. The Supreme Court has stressed that "the touchstone is business necessity" in disparate impact cases. *Griggs* 401 U.S. at 431; *see also* 42 U.S.C. § 2000e-2(k). To use this defense, the employer bears the burden of producing evidence to demonstrate that the selection criteria resulting in a disparate impact served legitimate employer goals and that alternative selection criteria would not serve the tendered interests of the company without discriminatory effect. *See e.g., Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134 (2d Cir. 2006).

Under a disparate treatment theory, an outplaced employee who is a member of a protected class can make a *prima facie* case by showing only (1) that s/he was qualified for the job; (2) that s/he was subject to adverse action; and (3) that others outside of the protected class were treated differently. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420 (4th Cir. 2000); *Dockins v. Benchmark Communications*, 176 F.3d 745 (4th Cir. 1999); *Runnebaum v. NationsBank of Maryland, N.A.*, 123 F.3d 156 (4th Cir. 1997). Once an employee has met this minimal burden, the burden shifts to the employer to defend its adverse action by demonstrating that it was taken for a legitimate non-discriminatory reason. *Id. But see Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (holding that the burden-shifting procedure does not apply to mixed-motive Title VII cases).

A downsizing employer may not escape liability to an outplaced employee simply because its RIF was driven by an economic downturn or other legitimate business drivers. The former employee may still prevail if s/he is able to convince a factfinder that (1) the RIF itself was a pretext for discriminatory action; *see McMahon v. Libbey-Owens-Ford Co.*, 870 F.2d 1073 (6th Cir. 1989); (2) while the RIF may have been legitimate, the individual's selection was

discriminatory, *see Shaw v. Titan Corp*., 149 F.3d 1170 (4th Cir. 1998); or (3) while there were some legitimate reasons for the selection, there were also discriminatory reasons (so-called mixed motive cases). *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(b); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 (8th Cir. 1995).

In ADEA claims, the employer's burden is lighter as, the employer need only meet a reasonableness standard. Courts have been willing to give greater deference to employers in their RIF decisions. So long as an employer's non-age related selection criteria is a reasonable means to reach a legitimate goal, courts generally refrain from second-guessing the termination.

Subjective criteria may provide a defensible basis for RIF selections, so long as the determination regarding the subjective criteria is based on objective facts. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000), *cert. denied*, 533 U.S. 950 (2001). For example, it would be legitimate for an employer to consider both the objective sales figures produced by an employee and the business ethics the employee demonstrates. If the employee produced an extremely high sales volume, but did so by making misrepresentations to customers, it would be defensible to outplace him in lieu of a lower-producing colleague.

When outplacement decisions involve workgroups that include a wide variety of ages, it is important to distinguish age itself from factors that may be correlated with age. This distinction is important, as employers can avoid liability in an ADEA disparate impact case, even where there has been a disproportionate and otherwise prohibited impact, if the selection resulted from a reasonable factor other than age (RFOA). 29 U.S.C. § 623(f)(1); *City of Jackson*, 544 U.S. at 238 (2005). It is not uncommon when comparing employees with a significant age difference for an employer to include in its assessment the relative salaries of its older and younger workers, or a presumption that the younger employee will stay with the employer for a

longer period of time. The Supreme Court has held that employment decisions based on factors that are distinct from, but may be correlated with age, such as salary levels, do not violate the ADEA so long as the factors are not simply a proxy for age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), *cert. denied*, 513 U.S. 1013 (1994). However, state laws may apply differently with regard to age discrimination claims based on factors such as these.

Additionally, presumptions regarding an employee's future tenure based solely on age may cross the line as criteria prohibited by the ADEA. The courts are not consistent in their conclusions as to whether the substantive provisions of the 1991 amendments to the Civil Rights Act apply to the ADEA, thereby calling into question whether the *Price Waterhouse* "mixed-motive" standard may be applied to ADEA claims to preclude liability for an employer that exhibits legitimate reasons for its decision, even if age was one criterion. *Compare e.g.*, *Fast v. Southern Union Co.*, 149 F.3d 885, 889 (8th Cir. 1998); *Miller v. Illinois Dep't of Corrections*, 107 F.3d 483, 484 (7th Cir. 1997); *Gonzagowski v. Widnall*, 115 F.3d 744, 749 (10th Cir. 1997); *with DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993); *Donovan v. Dairy Farmers of Am.*, 53 F. Supp.2d 194, 197 (N.D.N.Y. 1999), *aff'd sub nom. Donovan v. Milk Mkt'g., Inc.*, 243 F.3d 584 (2d Cir. 2001); *Siwik v. Marshall Field & Co.*, 945 F. Supp. 1158, 1162 (N.D. III. 1996). The EEOC has taken the position that the Civil Rights Act of 1991 "did not amend the Age Discrimination in Employment Act, and, therefore,…[an employer] could avoid liability if it could establish that it would have made the same decision even absent discrimination." Digest of Equal Employment Opportunity Law (Spring Quarter 2005) at 4. Under Section 107(b) of Title VII, however, an employer may be subject to an injunction and held liable for attorney's fees if its RIF selection was based on both legitimate and

discriminatory criteria. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)(i); *see Norris v. Sysco Corp.*, 191 F.3d 1043, 1050 (9th Cir. 1999), *cert. denied*, 528 U.S. 1182 (2000).

B. Anti-Retaliation Laws

By statute, regulation, and pursuant to case law developed on public policy grounds, employers are prohibited from retaliating against employees who engage in so-called "protected activity." In general, protected activity is defined as action taken by an employee which promotes some public policy and which has the potential to harm an employer. For example, whistleblower provisions in the Clean Air Act, 42 U.S.C. § 7622, Section 211 of the Energy Reorganization Act, 42 U.S.C. §§ 5851 *et seq*.**,** and the False Claims Act, 31 U.S.C. §§ 3729 *et seq*., bar an employer from discriminating against an employee who reports violations of these Acts. Likewise, the federal equal employment opportunity laws prohibit retaliation against employees who raise EEO issues with their employers, *see, e.g*., 42 U.S.C. §§ 2000e *et seq*., and most Workers' Compensation acts include anti-retaliation provisions, *see, e.g*., N.C. Gen. Stat. §§ 95-240 *et seq*. (1999). A retaliation claim may arise even when there has been no formal complaint. An employee may engage in protected activity simply by complaining to her supervisor that she has been sexually harassed by a co-worker or that her workgroup is engaged in unsafe activity. *See, e.g., Hearn v. R.R. Donnelley & Sons Co.*, 460 F. Supp. 546 (N.D. Ill. 1978), *cert. denied*, 469 U.S. 1223 (1985).

To make a *prima facie* case under most anti-retaliation laws, an employee need only demonstrate a temporal nexus between the employee's protected activity and the employer's

adverse action[3]. *See Kahn v. United States Secretary of Labor*, 64 F.3d 271 (7th Cir. 1995); *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995); *Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993); *De Anda v. St. Joseph Hospital*, 671 F.2d 850 (5th Cir. 1982); *Pace v. Paris Maintenance Co.*, 107 F. Supp.2d 251 (S.D.N.Y. 2000); *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471 (D. Kan. 1995). If an employee is able to show that she engaged in protected activity near to the time s/he was outplaced, the burden will shift to the employer to prove that the outplacement determination was justified on grounds wholly unrelated to the protected activity. *Id.*

C. The Family Medical Leave Act

The federal Family and Medical Leave Act (FMLA) provides job protection for covered employees who take up to twelve weeks of leave to attend to their own or a family member's serious health condition, or in the event of the birth or adoption of a child. 29 U.S.C. §§ 2601 *et seq.* Some state family leave acts provide even more liberal job protection. *See, e.g.*, D.C. Code §§ 32-501 *et seq.*; Mass. Gen. Laws Ann., Chapter 149 Labor and Industries, Section 149:52D.

The job protection provided under the FMLA is rigid – most employees are entitled to reinstatement to the same or a substantially similar position to the one held immediately prior to the leave, unless the employee would have been otherwise displaced from the position for reasons unrelated to the leave. 29 C.F.R. § 825.100(c)**.** Department of Labor regulations state that if an employee would have been laid off even if s/he had remained on the job, then the employee cannot challenge his/her layoff on FMLA grounds. 29 C.F.R. § 825.216(a)(1); *see*

[3] Employing the U.S. Supreme Court's standard for "adverse action" in Title VII cases, to establish a *prima facie* case, an employee need only demonstrate that the employer's action, which may be far less than termination of employment, might dissuade a reasonable person from making or supporting a charge of discrimination. *Burlington Northern & Sante Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006). As a result, an employer is well advised to also look carefully at the reasons it makes transfer and demotion decisions in the context of a RIF.

O'Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349 (11th Cir. 2000) (affirming judgment for employer who terminated employee on FMLA leave as part of RIF). Thus, if an employee is on FMLA leave when selected for outplacement, the employer should be prepared to show that it would have made the same decision even if the employee had not taken the leave. Similarly, when making selection decisions, an employer should not consider an employee's FMLA protected absences. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998).[4]

D. The Americans with Disabilities Act

The Americans with Disabilities Act prohibits discrimination against a narrowly defined population deemed "disabled." The ADA also requires employers to make reasonable accommodations for employees deemed disabled under the Act who can perform the essential functions of a job. 42 U.S.C. § 12111 (8) and (9).

Employers who consider an employee's physical limitations or the collateral impacts of those limitations during the RIF selection process must carefully consider their ADA accommodation obligations. In connection with a downsizing, an employee's position may be restructured in such a way that s/he can no longer perform the job's essential functions. For example, when staff is cut significantly, an employer may not be able to accommodate an employee's disability-related schedule requirements. *Earl v. Mervyns, Inc.*, 207 F.3d 1361 (11th Cir. 2000). Likewise, in restructuring an organization, an employer may change its per capita production standards, so that a disabled employee who could perform under a previous standard is no longer able to meet the essential functions of his/her job. *Milton v. Scrivner, Inc.*, 53 F.3d 1118 (10th Cir. 1995).

In either of these examples, the employer's decision to displace the employee from the changed position may be defensible on the ground that the employee can no longer perform the essential functions of the position.[5] However, the ADA analysis should not stop there. After determining that the employee cannot perform the essential functions of a post-RIF position, the employer should then determine whether the employee could perform the essential functions of the job if non-essential functions were shifted to other employees. If not, then the employer should consider whether there is another vacant position for which the individual is qualified, perhaps with a reasonable accommodation, particularly if the employer is moving other non-disabled displaced workers into new positions.[6]

Another potential ADA risk arises when an employer bases an outplacement determination on employee absences relating to a disability. Although numerous courts take the position that attendance is an essential function of almost any job, the EEOC takes the position that leave beyond that permitted under the FMLA may be a reasonable accommodation. *EEOC v. Yellow Freight Sys.*, 253 F.3d 943 (7th Cir. 2001); *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209 (4th Cir. 1994); *Jovanovic v. In-Sink-Erator Division*, 201 F.3d 894 (7th Cir. 2000); EEOC

[4] Note that there is a split in the Circuits regarding whether an employee can release claims that have accrued under the FMLA. Most recently, the Fourth Circuit has held that an employee cannot waive, and an employer cannot induce the waiver of, retrospective claims arising under the FMLA. *See Taylor v. Progress Energy Inc.*, No. 04-1525, 2007 U.S. App. LEXIS 15846 (4th Cir. July 3, 2007). However, the Fifth Circuit and the Eastern District of Pennsylvania have held that an employee can waive claims that have already accrued. *See Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003); *Dougherty v. TEVA Pharms. USA, Inc.*, No. 05-2336, 2007 U.S. Dist. LEXIS 27200 (E. D. Pa. Apr. 9, 2007). The Department of Labor filed an amicus brief in *Dougherty* arguing that 29 C.F.R. § 825.220(d) was not intended to bar an employee's release of claims accrued under the FMLA. Although the Department. filed a similar brief in *Taylor*, the Fourth Circuit declined to adopt the Secretary of Labor's interpretation of § 825.220(d).

[5] The EEOC consistently has taken the position that the "essential functions" analysis applies only to the performance of particular tasks. The EEOC contends that employer modifications to *when* tasks are performed are subject to an undue hardship analysis. "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA."

[6] The EEOC takes the position that disabled employees who no longer can perform the essential functions of a particular position should be given preferential reassignment to vacant positions. A number of courts considering this issue have held otherwise. *See, e.g., Skrjanc v. Great Lakes Power Service Co.*, 272 F.3d 309 (6th Cir. 2001); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998); *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001).

Enforcement Guidance, Q.17. The Agency's *Enforcement Guidance on Reasonable Accommodation* takes this obligation further by claiming that a disabled employee's performance should be evaluated only for the period in which s/he worked. *Enforcement Guidance*, Q.19. At least one Circuit Court, however, has held that an employer can defend a RIF selection process based on a performance appraisal, even when the appraisal considers absences resulting from a disability. *See Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997). Given the unsettled law in this area, prudent employers should consider thoughtfully whether to outplace an employee due to disability-related absences.

E. Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq*., protects the employment and reemployment rights of any individual who is absent from work as a result of service in the U.S. armed forces. Employees protected by USERRA include, among others, reservists called up to serve in the war in Iraq.

USERRA prohibits an employer from taking "any adverse employment action against" an employee when the employee's "obligation for service in the uniformed services is a motivating factor in the employer's action." 38 U.S.C. § 4311(b), (c)(1). To succeed on a claim under Section 4311 in the context of a RIF, an outplaced employee will have to show that his or her service obligation was a motivating factor for the termination; a mere proximity in time between the adverse action and the service obligation will not be enough to substantiate a USERRA claim. *See e.g., Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F.Supp. 571 (E.D. Tex. 1997).*

USERRA requires employers to reinstate employees to the position they would have achieved had their employment not been interrupted by military service. However, as with the

FMLA, USERRA's reinstatement rights are not absolute. An employer's refusal to reemploy a person returning from military leave is permissible where: (1) employer's "circumstances have so changed as to make such reemployment impossible or unreasonable", (2) assisting the person to become qualified for the reemployment position would pose an "undue hardship", or (3) the position left by the person was for a "brief , non-recurrent period". 38 U.S.C. § 4312(d)(1)(A)-(C).

An employer may argue that a RIF driven by an economic downturn or other legitimate business factors constitutes changed circumstances that would render reemployment unreasonable or an undue hardship. *See* 20 CFR 1002.139(a); USERRA legislative history: H.R. Rep. No. 103-65, at 25 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2458. In such cases it will be important to document the fact that the service man or woman would have been outplaced regardless of his or her military service.

F. The National Labor Relations Act and Collective Bargaining Agreements

Employers contemplating laying off bargaining unit employees may be required under the National Labor Relations Act ("NLRA") to bargain with the union over the decision. If a layoff decision arises out of an employer's relocation of bargaining unit work, the National Labor Relations Board ("NLRB") can make a *prima facie* case for mandatory bargaining by showing that the relocation of the work was unaccompanied by a basic change in the nature of the employer's operation. *Dubuque Packing Co.*, 303 N.L.R.B. 386 (1991). An employer can rebut this *prima facie* case by showing:

- The work performed at the new location varies significantly from the work performed at the old location;
- The work performed at the old location is to be discontinued entirely or not moved; or

- The decision involved a change in the scope and direction of the enterprise.

Alternatively, the employer may show that:

- Labor costs were not a factor in the decision, or
- Even if labor costs were a factor, the union could not have offered concessions that could have changed the employer's decision to relocate.

Even if it is determined that an employer's layoff decision is not a subject for collective bargaining, the employer must nonetheless bargain over the effects of the layoff. Layoff effects subject to bargaining include how those laid off are selected, whether the employer will provide severance benefits and what transfer and reemployment rights will be provided to displaced bargaining unit members. As a practical matter, such issues are typically addressed in a collective bargaining agreement. However, in those cases where the issues have not been addressed, once a RIF decision has been made, the employer should promptly notify the appropriate union representatives to initiate negotiations over RIF effects.

G. Employee Handbook Claims

Some jurisdictions recognize policies in an employee handbook as giving rise to a contract claim. *See Sewell v. Black Butte Coal Co.*, 963 F.2d 382 (10th Cir. 1992). Therefore, an employer should review carefully the material in its handbook relating to lay-offs to ensure that its selection criteria are consistent with its written policy.

III. PLANNING A RIF

In addition to the concrete legal risks discussed in Section II, mass lay-offs typically have other collateral impacts on a business. RIFs disrupt the workplace and may lead to decreased morale, diminished loyalty and lower productivity among the employee survivors. In addition, a mass layoff may end up front page news in a company's community, leading to a loss of confidence in the business on the part of customers, increased confidence in the competition

(they didn't have to lay anyone off, so they must be better managers) and difficulties in recruiting new workers. Recruiting may be particularly difficult if an employer realizes within months of a RIF that it has cut too deeply.

The key to minimizing the potential negative impacts arising out of a RIF is thoughtful planning. Mass lay-offs should not occur as a panicked reaction to losing a large account or to a temporary slowdown in the local or national economy. An employer should carefully study the reasons for and implementation of a layoff and document this planning process. This documentation may be helpful in the event the RIF is challenged as a pretext for discriminatory actions. *See, e.g., McMahon v. Libbey-Owens-Ford Co.*, 870 F.2d 1073 (6th Cir. 1989) (judgment for plaintiffs upheld because they established that immediately prior to layoff defendant hired new managers at a cost that exceeded the savings from the layoff). If contemporaneous documentation is created, courts typically are hesitant to second-guess an employer's decisionmaking. *See EEOC v. Louisiana Office of Community Servs.*, 47 F.3d 1438 (5th Cir. 1995) (hiring panel's decisions upheld when panel evaluated applicants based on "interview packet" consisting of application, narrative by applicant detailing job knowledge and qualifications, summary of references, and interview notes).

The factors to be considered and documented should include the following:

- The financial conditions giving rise to the RIF
- The goals of the RIF
- The job functions and/or skills necessary post-RIF
- Limitations on workforce reductions
- The way in which outplaced employees will be selected
- Consideration, design and implementation of a severance plan

The remainder of this paper will provide a summary of these planning steps. For a more complete treatment of the RIF planning process, the authors recommend The Rightsizing Remedy by Charles F. Hendricks; and Corporate Counsel's Guide to Reduction In Force by William A. Hancock.

A. Select the Positions to be Eliminated

An employer should be able to tie its workforce reductions to its goals. To do so, the process begins with determining what work will be performed post-RIF and what positions will be used to perform it. In performing this analysis, an employer should first identify the pool of positions it wants to examine for potential cuts. Whenever possible, management should focus on the positions and skills required to perform the post-RIF work in the most efficient manner. When circumstances allow, the post-RIF work should not be planned around the skill sets of a predetermined set of individual workers who will survive the lay-offs.

After determining what positions will perform the work post-RIF, the employer should then compare the post-RIF organization with its current organization to determine where the cuts will come. The positions subject to this comparative analysis should fall into one of the following three categories:

(1) the position will exist post-RIF with identical requirements and responsibilities;
(2) the position will exist post-RIF with some of its pre-RIF requirements and responsibilities as well as new post-RIF requirements and responsibilities;
(3) the position will not exist post-RIF because the work done by the position pre-RIF has been moved to other positions either in whole or in part, or because the employer will not need the pre-RIF work done post-RIF.

Potential staffing changes and cuts will focus on the categories two and three positions. With this information, the employer can develop an organizational chart to reflect the anticipated appearance of the affected aspects of the company post-RIF. Documentation at all stages of the RIF is essential to guard against liability resulting from the RIF.

B. Examine WARN Act Obligations

Once an employer has determined how many and where positions will be eliminated, it must then determine whether it has a duty to provide pre-RIF notice to impacted employees under the federal Worker Adjustment and Retraining Notification Act ("WARN"). The Act applies to employers with more than 100 employees who work in the aggregate more than 4,000 hours per week. WARN requires that employers provide 60 days notice to employees and state and local governments agencies in the event of a "mass layoff" or "plant closing." 29 U.S.C. § 2102. The focus of WARN's notification triggers is on where the impacted employees are located. RIFs involving small numbers of employees at multiple, geographically dispersed locations are typically not covered by WARN.

WARN defines "plant closings" to include any closing of a "single site of employment" for six months or more when the closing results in an employment loss for more than 50 workers during a 30-day period, 29 U.S.C. § 2101(a)(2). WARN also provides that, in certain instances, employment losses can be aggregated over a 90-day period rather than a 30-day one. An employment loss is deemed to occur if a worker either loses his/her job or if the worker's hours are reduced by more than 50% for six months or more. 29 U.S.C. § 2101(a)(6).

For purposes of WARN, a "mass layoff" occurs when 33% of the workers at a single site of employment are terminated during a 30-day period, if the impacted work force consists of more than 50 workers. 29 U.S.C. § 2101(a)(3)(B)(i)(I) and (II). WARN's mass layoff trigger may also occur if, during a 90-day period, two or more RIFs occur which would not trigger the Act's notice requirement standing alone, but would if counted together. 29 U.S.C. § 2102(d). Any layoff covering 500 or more employees at a single site of employment triggers WARN's notice requirements. 29 U.S.C. § 2101(a)(3)(B)(ii).

Failure to comply with WARN's notice requirements may result in liability to affected employees for back pay and benefits for each day of the violation up to 60 days. As a practical matter, some employers would prefer to provide 60 days pay to employees in lieu of notice. However, employers who provide compensation in lieu of WARN notice should note that such compensation must be in addition to any other severance benefits to which the employee is entitled.

Depending on the events triggering a mass layoff or plant closing, there is a narrow set of circumstances where an employer may avoid the WARN Act's notice requirements. For instance, at least one federal circuit has held that "the WARN Act does not apply in the context of government-ordered closures over which the employer has no control." *Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1045 (9th Cir. 2003) (holding that an airport security company is not liable under WARN for inadequate notice when the layoff was forced by passage of the federal Aviation and Transportation Security Act). Additionally, an employer may reduce the required notice period or eliminate it altogether "if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(2)(A); *see Roquet v. Arthur Andersen LLP*, 398 F.3d 585 (7th Cir. 2005), *cert. denied*, 546 U.S. 871 (2005) (holding that, since massive business losses resulting from close ties to Enron were not reasonably foreseeable, the accounting firm was not liable under WARN for inadequate notice). Nevertheless, the exceptions to WARN notice are narrow, and employers are still required to give as much notice as is "practicable." 29 U.S.C. § 2102(b)(3).

In addition to federal WARN requirements, employers may be subject to state notification requirements as well. Several states have statutes that outline specific requirements concerning the provision of advance notice to employees of plant closings and mass layoffs.

C. Design and Implement a Selection Process

After designing the post-RIF organization, the employer must determine how it will select the workers who will, and more importantly for purposes of risk management will not, fill the positions. In designing a selection process, an employer should first consider what limitations, if any, already exist. Most collective bargaining agreements include specific provisions addressing how layoffs involving bargaining unit members will be implemented. An employer may also have workers under contract who may be entitled to be paid for a specific term, so that even if they were laid off, the employer would experience no cost savings as a result. Finally, an employee handbook may specify the way in which individuals are selected for layoff. As discussed in Section II, in some jurisdictions such handbook provisions may create contractual obligations on the part of the employer.

An employer with no preexisting limitations must then determine whether it will use objective or subjective criteria in making selection decisions. The upside to using objective criteria is the simplicity in making selection decisions and in later explaining them. If used consistently, the legal risks arising out of objective RIF decisions are minimal. The downside to using objective criteria is that an employer could lose its highest performing employees.

Objective criteria are simplest to use when the job requirements for a given position have not changed and there will be fewer workers in the position going forward. Objective criteria may also be used when the requirements of a position have changed due to a reallocation of job duties and there are more individuals qualified for the redesigned position than there are

available positions. In the latter circumstance, an employer will need to determine how it will define who, among qualified candidates, should be considered for the position. The pool may include only those who were in the positions before they were redesigned. An employer may want to expand the pool to consider both those who were in the position before it was redesigned as well as those in positions that have been eliminated whose work has been moved to the redesigned positions.

Once the pool of qualified individuals has been selected, defensible objective selection criteria include:

(1) Seniority (common under collective bargaining agreements)

(2) Lottery

(3) Measured quantity of production

(4) Elimination of complete job classifications

(5) Compensation levels

One potentially risky objective criterion is pension eligibility if pension eligibility is driven exclusively by age. The Supreme Court has ruled that pension eligibility was a legitimate selection criterion if the pension eligibility was based on years of service, rather than age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), *cert. denied*, 513 U.S. 1013 (1994). The Court indicated that if pension eligibility is based solely on a worker's age, consideration of that criterion could be deemed a proxy for age, giving rise to an age discrimination claim.

Subjective selection criteria allow an employer to keep its better performing employees, to ensure that its leaner post-RIF workforce operates at maximum efficiency. While employers have been able to defend subjective selection processes, *see Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231 (4th Cir. 1991); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000), *cert. denied*, 533 U.S. 950 (2001); *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274 (4th Cir. 2000), the potential risks of subjective decision making are exponentially higher than those associated with objective criteria.

The key to defending subjective selection criteria is in the process used. Before making any selection decisions, an employer should carefully document the job requirements for the post-RIF positions and the selection criteria that will be used. For example, if management has decided to add customer service responsibilities to a position that previously required performing individualized technical functions, the selection criteria for the post-RIF position might include both technical competency and inter-personal skills. When both criteria are used in the evaluation process, an incumbent with strong technical skills who does not get along well with others may not be the most qualified candidate. *See, e.g., Anderson v. Genuine Parts Co.*, 128 F.3d 1267 (8th Cir. 1997) (during reorganization process, it was legitimate for employer to assess demoted employee's performance against outside sales reps, rather than against the defendant's sales requirements).

Once the skills and selection criteria have been determined, an appropriate candidate pool should be selected. As discussed in connection with objective criteria, the candidate pool may include incumbents only, or incumbents as well as workers displaced from other positions who are qualified for the post-RIF position. The inclusion of workers outside these two groups may be risky, particularly if someone not currently performing any portion of a position's post-RIF work unseats an incumbent and/or gets a promotion. The movement of someone not previously doing the impacted work into an impacted position may result in challenges from both unseated incumbents as well as non-incumbents who were qualified, but not considered for, the post-RIF position. The employer should consider whether the pool as defined includes employees on

leave. Employees whose leave is covered by the FMLA *must* be considered during the selection process.

After defining the candidate pool, management familiar with the skills of the impacted workers should perform a relative ranking. It is important to have more than one decisionmaker to ensure both the integrity of the process and the appearance of fairness post-selection. The documentation prepared during the selection process should include evaluation or ranking forms, to demonstrate how the decisions were made. The rankings themselves should be based on historical documentation such as performance evaluations. If past performance evaluations do not include all of the criteria relevant to evaluating an individual for a redefined post-RIF position, management should be able to support its relative assessment with other objective data. *See, e.g., EEOC v. Texas Instruments*, 100 F.3d 1173 (5th Cir. 1996) (legitimate for employer to ignore past performance evaluations that did not provide "worthwhile information about the *comparative* worth" of employee) (emphasis in original). *See also Coleman*, 232 F.3d at 1282-86. As discussed above, in Section II.D., employers who consider attendance as part of a subjective evaluation process should be mindful of potential ADA and FMLA risks associated with negative consideration of absences covered by those Acts.

D. Reassignment of Displaced Workers

Once positions in the new organization have been filled using either objective or subjective criteria, the employer must determine whether the unassigned workers will be assigned to other positions. As discussed above, the employer may want to place workers whose jobs have been eliminated or who otherwise have been displaced in the pool for positions in an impacted organization. An employer may also consider placing displaced workers in vacant positions outside of the impacted organization. While an employer may have legitimate reasons

for wanting to retain a high-performing displaced worker, risks arise when jobs are offered to some displaced workers but not others if the employer cannot articulate an objective non-discriminatory basis for doing so. *See, e.g., Jacobson v. Pitman-Moore, Inc.*, 582 F. Supp. 169 (D. Minn. 1984); *Fugate v. Allied Corp.*, 582 F. Supp. 780 (N.D. Ill. 1984); *Ward v. Gulfstream Aerospace Corp.*, 894 F. Supp. 1573 (S.D. Ga. 1995); *Butchko v. Textron Lycoming*, 796 F. Supp. 63 (D. Conn. 1992).

E. Review Selection Decisions for Potential Risks

Once selection decisions based on subjective criteria have been made, they should be reviewed by a non-decisionmaker to assess potential legal risks. It is important to perform a review as soon as the employer has reached a decision. Disparate impact analysis should be done after the preliminary decisions have been made to check for potential liability early. It is preferable to have this review facilitated by counsel so that the employer can assert the attorney-client privilege over documents and discussions related to the review should litigation arise. However, if the employer does not have in-house counsel, and does not want to get outside counsel involved, trained human resources personnel may also effectively perform a risk analysis.

At a minimum, the risk analysis should include (1) an adverse impact analysis; and (2) employee file review. An adverse impact analysis should begin with a comparison between the demographics of the pre-selection workforce and those of the post-selection workforce. The risk analysis should examine the company as a whole, as well as subgroups, such as departments, positions and decision makers for disparate impact to identify any areas that may contribute to employer liability. As discussed in Section II.A. of this paper, impacts that should be analyzed further are those in which there is more than a two standard deviation difference between the

placement rates of individuals in particular demographic groups, or those that violate the EEOC's four-fifths rule. If the data indicate an adverse impact, the person conducting the risk analysis should carefully review the selection criteria to ensure that it is job related and consistent with business necessity. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

After looking for potential adverse impact, the person performing the risk analysis should then review the personnel files for both impacted and non-impacted employees. Red flags to look for during the file review include:

(1) employees with less experience being retained while employees with greater experience are outplaced;

(2) employees with outstanding performance evaluations being outplaced while employees with mediocre performance evaluations or code of conduct problems are retained;

(3) attendance issues impacting job performance or performance rankings that are related to an FMLA or ADA-related leave of absence; and

(4) recent protected activity such as a sexual harassment or safety-related complaint.

When such red flags appear, it is important that the decisionmaker be consulted to ensure that the selection decision can be defended on legally sufficient grounds. Explanatory information not currently in an employee file explaining the bases for the defensibility of a selection decision should be documented. In addition, where adverse impact has been identified, particular care should be taken when comparing the files of selected and non-selected employees to ensure that subjective selection criteria have been applied consistently. Decisions that cannot be easily defended should be reconsidered.

F. Considering and Designing a Severance Plan

A downsizing employer should consider whether it will provide severance benefits to its laid off workers. There is no federal or state requirement that employers provide severance

benefits. Many collective bargaining agreements require severance benefits and some employers provide for severance payments in their employee handbook.

1. Reasons for Providing Severance Benefits

Many downsizing employers believe that the financial conditions driving a downsizing make it imprudent to provide severance benefits. Unless the employer is on the brink of liquidation, this is rarely the case. A properly structured severance plan can be an effective risk management tool, allowing an employer to spend money to provide transition benefits to all outplaced employees, rather than to pay lawyers to defend lawsuits brought by a few. In addition, a consistently applied severance program may improve retention rates for post-RIF employees, serve as a recruiting tool post-RIF and reduce the negative publicity arising out of a RIF.

2. Benefits included in a severance plan

The most common form of severance benefit is severance pay, provided either in a lump sum or in the form of post-termination salary continuation. The amount of severance pay is typically determined by a formula that considers the position from which the employee is outplaced and the employee's length of service. Executives may receive between one and four weeks' salary for each year of service, middle management between one and two weeks of pay for each year of service, and others one week for each year of service. Other common severance benefits include extended health care coverage either through COBRA subsidies or remaining in an employer's plan, and job counseling and other reemployment services.

3. Release programs

In terms of risk management, the most effective severance program is one that conditions the receipt of all or part of the program's benefits on the execution of a release by the outplaced

employee. Courts have held that such conditions are legitimate. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 721 (3d Cir.), *cert. denied*, 516 U.S. 916 (1995); *Adams v. Moore Bus. Forms, Inc.*, 224 F.3d 324 (4th Cir. 2000); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th. Cir.), *cert. denied*, 502 U.S. 859 (1991). In order for a release to cover claims under the ADEA, the employer must comply with the requirements of the Older Workers Benefit Protection Act ("OWBPA")—that the release is "knowing and voluntary." These requirements include the following:

(1) The release must be written in "simple English";

(2) The release must refer expressly to the ADEA;

(3) The release must cover only claims arising before the release is executed;

(4) The release must be in exchange for something of value;

(5) The outplaced employee must be advised, in writing, to consult with an attorney;

(6) The employee must be given 45 days in which to consider whether to sign the release; and

(7) The employer must disclose the ages and job titles of those in the relevant job classification or department who will not be laid off.

See 29 U.S.C. § 626(f)(1). Furthermore: "The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations." 29 C.F.R. § 1625.22(b)(4). An employer who fails to meet the OWBPA's requirements may not use a release as a defense to an ADEA claim. To add insult to injury, an outplaced employee may be able to retain his or her severance benefits and still sue the employer under the ADEA if OWBPA has not been followed. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

An employer who has followed OWBPA to the letter may still have to respond to an EEOC charge alleging claims under the ADEA or another federal anti-discrimination law. Courts have carefully distinguished the difference between a *claim* and an EEOC *charge*. On one hand, a claim involves "the seeking of 'one's own' from another." *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1089 (5th Cir. 1987) (citing Black's Law Dictionary 49, 280, 313, 516 (rev. 4th ed. 1968)). On the other hand, an EEOC charge is intended "'to place the EEOC on notice that someone . . . believes that an employer has violated the [law].'" *Id.* at 1089 (referencing 29 C.F.R. § 1626.4 (1986)). While a release may prevent an outplaced employee from bringing a *claim* against his or her employer under the ADEA, it is less certain that an employee can waive his or her right to file a *charge* with the EEOC, and the EEOC may still pursue an action on behalf of an outplaced employee because the EEOC is not a party to the release. *See, e.g., EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006) (holding that a waiver of the right to file a claim against an employer is not facially retaliatory); *Cosmair*, 821 F.2d at 1091 (holding that an employee may release *claims* against his or her employer, however a release of the right to file an EEOC *charge* is void, unenforceable, and contrary to public policy); *U.S. EEOC v. Lockheed Martin Corp.*, 444 F.Supp.2d 414 (D. Md. 2006) (holding that a release of an outplaced employee's right to file an EEOC charge is facially retaliatory and unenforceable). Thus, while an employee may release his or her right to recovery, that employee may not release the right to inform the EEOC of potential employment discrimination.

Even though courts have ruled that a release of an employee's right to file an EEOC charge is void and unenforceable, they have retained the power to enforce the remainder of the release absent the offending clause. *See e.g., Cosmair*, 821 F.2d at 1091 (citing Restatement (Second) of Contracts § 184(1)) ("[T]he fact that a waiver of the right to file a charge is void

does not invalidate a waiver of a [claim] with which it is conjoined. A court may enforce [the] remainder of [an] agreement unenforceable in part as against public policy when 'performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.'")

As a practical matter, the EEOC is less likely to pursue an action on behalf of an employee who has received some form of severance benefits. Similarly, a former employee who has received severance benefits and who may feel s/he has been treated fairly faces less economic desperation between jobs and will, as a result, be less likely to spend the time and energy it takes to pursue an EEOC charge or other legal claim.

4. ERISA Requirements

Written employer severance plans calling for periodic payments may be covered by the Employee Retirement Income Security Act of 1974 ("ERISA"). The writing may be a formal plan document or a provision in an employee handbook describing severance benefits. An informal severance program may also be covered by ERISA, on the basis of an employer's oral representations, the existence of a fund or account from which benefits are paid, the actual payment of benefits, past practice, the reasonable expectations of employees or the intentions of the sponsor. ERISA does not cover severance plans comprised solely of lump sum payments to outplaced employees.

Most severance plans are deemed health and welfare plans by ERISA.[7] Severance plans deemed health and welfare plans are subject to minimal procedural and substantive regulation. The procedural requirements include:

(1) The employer must make periodic reports to the U.S. Department of Labor;

[7] A severance plan is deemed a pension plan under ERISA only if it is (1) contingent upon the employee's retirement; (2) includes payments equal to more than twice the employee's annual salary; and (3) provides for payments to be made over more than two years.

(2) The employer must disclose the contents of the severance plan to employees; and

(3) The plan must include a claims procedure for those who feel they have been wrongfully denied severance benefits.

29 U.S.C. §§ 1021, 1133. The substantive requirements include:

(1) The terms must be reasonable; and

(2) The administration of discretionary features of the plan must not be arbitrary and capricious.

See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); *Bogue v. Ampex Corp.*, 976 F.2d 1319 (9th Cir. 1992), *cert. denied*, 507 U.S. 1031 (1993).

To meet these ERISA standards, an employer should include the following features in its severance plan:

(1) Identification of the specific triggers for severance benefits (*e.g.*, termination, demotion, relocation) and reserve management discretion in other situations;

(2) A definition of the benefits to be provided, based on a formula or otherwise;

(3) An express notice that a purchase of the company or its assets will not trigger benefits unless the employee actually experiences a defined employment loss;

(4) An express condition that execution of a release is a condition to the receipt of severance benefits;

(5) A claims procedure which identifies a Plan Administrator; and

(6) A reservation of rights permitting the employer to modify or eliminate the benefits at any time.

Once the plan is drafted, management should put checks in place to ensure that it is applied consistently to all outplaced employees.

G. Preparing a Communication Plan

As discussed above, an employer may be required by the WARN Act to provide 60 days notice before laying off workers. An employer may also have a pre-RIF notice obligation under

a collective bargaining agreement or may have committed itself to providing advance notice in an employee handbook. Even when there is no legal obligation to notify employees pre-RIF, it is nonetheless important to consider when and how to communicate with workers once the determination to cut jobs has been made.

The most significant reason for communicating early and often is to squelch the rumor mill. Regardless of what they are told by management, employees know when business is down in their workplace, and in their community. If management is not forthcoming about its layoff plans, workers will fill in the blanks for themselves, so that the information gap is filled by rumors, many of which will be inaccurate. Inaccurate rumors can result in considerable workplace disruption and unwanted employee turnover. In terms of managing post-RIF risks, management should consider that workers who believe they were treated honestly and humanely are less likely to bring claims.

Information that the employer should consider communicating before a layoff includes the following:

(1) The fact that worker reductions will occur;

(2) Where the reductions will occur;

(3) How many reductions will occur;

(4) How those outplaced will be selected;

(5) When the outplacements will occur; and

(6) What, if any, severance benefits will be provided.

This information may be provided in a single communication, or a series of communications, depending upon the length of time an employer has to plan a RIF.

Once selection decisions are made, management should plan to provide individualized notification to each impacted worker if at all possible. The communication should be made in a private setting and should be brief, direct and firm. Where a number of employees must be notified, it may be a good idea to prepare talking points in advance so that displaced workers receive a consistent message. The communicator should be able to provide information regarding the availability of severance benefits and know where to send the employee for additional information. Management should do its utmost to ensure that displaced workers are given every opportunity to maintain their dignity both during and after the communication is made.

Once all impacted workers have been notified, an employer should communicate to its non-impacted workers that the RIF is complete. This communication should provide objective facts regarding the numbers and locations of outplaced workers. Neither in this communication nor under any other circumstances should management discuss with non-impacted workers any individual selection decision. If the media makes inquiries regarding the RIF, management should ensure that any information provided to the media is also provided to workers.

IV. CONCLUSION

An employer's decision to lay off workers is fraught with risks and should not be made in haste. The key to risk management when laying off workers lies in taking a thoughtful approach that recognizes both the legal and significant employee relations issues that can result from a Reduction in Force. An organized RIF plan, such as the one discussed above, should assist employers in managing the RIF process so that the impacts of employee layoffs do not continue for years to come.

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