606 Layoffs, Downsizing, and RIFs: How to Do Them Right

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Douglas R. Hart

Douglas R. Hart is a partner in Sheppard, Mullin, Richter & Hampton LLP's Labor and Employment Practice Group in the firm's Los Angeles office. Mr. Hart represents employers in state and federal court and before state and federal administrative agencies with respect to all aspects of employment law and labor relations including wrongful discharge, employment discrimination, National Labor Relations Act, and wage and hour issues. He has represented employers in major union organizing campaigns, and has significant experience with the healthcare and construction industries. Mr. Hart regularly counsels employers on personnel policies and procedures, employee discipline matters, corporate restructuring and reorganizations, labor relations issues pertaining to mergers and acquisitions, executive compensation and employment contracts.

Mr. Hart also specializes in large complex employment litigation. He is lead counsel for the Los Angeles County Sheriff's Department in the largest employment related class action in Los Angeles County's history. In May of 2001, Mr. Hart was awarded the Sheriff's Department Attorney of the Year Award in recognition of his success at handling the class action lawsuit. Mr.Hart is also lead counsel in several large wage and hour class action lawsuits currently pending in California Superior Courts.

Mr. Hart graduated Order of Coif from University of Nebraska Law School where he served as the Managing Editor of the *Nebraska Law Review*.

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V. Scott Kneese is a partner in the law firm of Bracewell & Patterson, L.L.P. in Houston. Mr. Kneese represents corporate clients in a broad range of labor relations problems and employment disputes. He has extensive experience in representing corporate clients in class actions including those arising out of reductions in force. He has successfully handled an extensive number of union election campaigns and/or collective bargaining negotiations. He has also litigated numerous discrimination cases in the federal and state courts and unfair labor practice cases before the National Labor Relations Board.

Mr. Kneese is the author of a chapter of *The Developing Labor Law*, published by the ABA section of Labor and Employment Law. Mr. Kneese is also editor of the ABA publication *How to Take a Case Before the NLRB* and is responsible for the chapter on elections. Mr. Kneese is a past chairman of the Labor Lawyers Advisory Committee of Council for Union Free-Environment (CUE). He is a member of the College of Labor & Employment Lawyers and has been listed as a labor and employment law specialist in every edition of *The Best Lawyers in America*.

Mr. Kneese received a BAA and an LLB from the University of Texas Law School and has been certified as a Labor Law Specialist by the Texas Board of Legal Specialization.

Kathlyn E. Noecker

Kathy Noecker is a partner in the labor and employment law group of Faegre & Benson LLP, in Minneapolis, MN, where she has practiced for 15 years representing employers of all sizes. She regularly advises clients regarding harassment investigations; discipline and discharge decisions; executive employment, compensation and transition issues; personnel policies and handbooks; noncompetition and confidentiality agreements; planning and implementation of reductions in force; wage and hour; and other labor relations and employment issues. Ms. Noecker has successfully defended employers against a variety of discrimination, reprisal, contract, and tort claims in federal and state courts and administrative agencies.

In addition to her legal practice, Ms. Noecker serves as Faegre & Benson's Equal Employment Officer, a position in which she has frontline management responsibility for discrimination and harassment issues. She is also cochair of one of the firm's pro bono projects, a walk-in clinic providing free legal services to the Native American community in Minneapolis.

Ms. Noecker is a graduate of the College of St. Catherine, and received her law degree magna cum laude from the Georgetown University Law Center.

Lynne M. Rasmussen

Lynne M. Rasmussen is secretary and general counsel of Endovascular Solutions, a division of Guidant Corporation located in Menlo Park, CA.

Ms. Rasmussen previously worked as in-house counsel for the Cardiac Rhythm Management and Cardiac Surgery divisions of Guidant Corporation. Prior to joining Guidant Corporation, she spent several years in private practice, providing counsel on a variety of complex commercial litigation matters, and while in private practice, also taught legal research and writing to first year law students at the University of Minnesota.

Ms. Rasmussen received a BA from the University of Minnesota and is a graduate of Boalt Hall School of Law, University of California, Berkeley.

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Christine J. Wichers is a partner in the Labor, Employment & Benefits Group at Choate, Hall & Stewart in Boston. Ms. Wichers represents clients in various industries in the litigation of employment disputes before state and federal trial and appellate courts and administrative agencies. She also regularly counsels clients on day-to-day employment issues, such as implementing reductions in force, avoiding discrimination lawsuits, complying with the Family and Medical Leave Act, accommodating disabled employees, investigating harassment complaints, complying with wage-and-hour laws, disciplining and terminating employees, drafting employment and separation agreements, and drafting employee handbooks. Ms. Wichers also conducts anti-harassment training for clients.

Prior to joining Choate, Hall & Stewart, Ms. Wichers clerked on the U.S. Court of Appeals for the Fourth Circuit and worked in the Labor and Employment group at the law firm of Buchanan Ingersoll in Pittsburgh.

Ms. Wichers represents clients pro bono through the Boston Women's Bar Foundation Family Law Project for Battered Women. She also represents the Massachusetts Association of Minority Law Enforcement Officers pro bono. Ms. Wichers serves on the American Arbitration Association Employment Advisory Council and on the Boston Bar Association's Labor and Employment Section Steering Committee. She is a member of her firm's Diversity and Hiring Committees.

Ms. Wichers received a BA from Dartmouth College and a JD from the University of North Carolina School of Law, where she was an editor on the law review and was named to the Order of the Coif.

LAYOFFS, DOWNSIZING AND RIF'S

Employer Obligations Pursuant to The Worker Adjustment And Retraining Notification Act (WARN) and Employer Responsibilities in the Union Setting

By: Douglas R. Hart
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THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN)

A. History and Purpose

The Worker Adjustment and Retraining Notification Act ("WARN Act") became law on August 4, 1988 and was effective February 4, 1989. The WARN Act requires that a covered employer provide its employees with sixty (60) days advance written notice of a plant closing or mass layoff, or provide sixty (60) days pay in lieu of such notice. 29 U.S.C. § 2101, et seq.

The purpose of the WARN Act is to ensure that workers and their communities receive advance notice of a loss of employment so that the employees may begin searching for other employment or, if necessary, obtain training for another occupation. Id. § 639.1.

B. Covered Employees

1. The WARN Act covers any business enterprise that employs either:

(a) 100 or more employees, excluding "part-time employees" defined as an employee who is employed for an average of fewer than twenty (20) hours per week or who has been employed for fewer than six (6) of the twelve (12) months preceding the date on which notice is required; or

(b) 100 or more employees, including "part-time employees," who, in the aggregate, work at least 4,000 hours per week, excluding overtime hours.

2. Determination of Whether Coverage Thresholds are Met

(a) The point in time at which the number of employees is to be measured for the purpose of determining coverage is the date the first notice is required to be given. 20 C.F.R. § 639.5(a)(2) (2002). However, if this number of employees is clearly unrepresentative, the Department of Labor ("DOL") regulationspermit an employer to use an average or ordinary employment level on average over a recent period of time or as of an alternative date.

(b) Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees. An employee has a "reasonable expectation of recall" when he/she understands, through notification or through industry practice, that his/her employment

with the employer has been temporarily interrupted and that he/she will be recalled to the same or to a similar job. Id. § 639.3(a)(1)(ii).

(c) The 100 employee threshold relates to the employer's total headcount at all locations, including foreign sites. Id. § 639.3(i)(7).

(d) Independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending on the degree of their independence from the parent. The factors that are considered in this determination are: (1) common ownership, (2) common directors and/or officers, (3) de facto exercise of control, (4) unity of personnel policies emanating from a common source and (5) the dependency of operations. Id. § 639.3(a)(2).

(e) The DOL concludes that regular federal, state, local and federally recognized Indian tribal governments are *not* covered as employers under the Act. Id. § 639.3(a)(1)(ii). The term "employer" *does* include public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise or provide independent management of public assets), and which are separately organized from the regular government and have their own governing bodies and independent authority to manage their personnel and assets. Id.

C. When Notification is Required

Covered employers must provide sixty (60) days advance written notice of a domestic plant closing and/or mass layoff as defined in the Act.

1. Definition of Plant Closings

The term "plant closing" means the permanent or temporary shutdown of a "single site" of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an "employment loss" for fifty (50) or more employees during any thirty (30) day period, excluding any part-time employees defined as employees who are employed for an average of fewer than twenty (20) hours per week or who have been employed for fewer than six (6) of the twelve (12) months preceding the date on which notice is required. 29 U.S.C.A. §§ 2101(a)(2), (8).

The DOL regulations explain that the language of Section 2101(a)(2) of the WARN Act, more specifically the use of the words "results in," contemplates that both employment losses of the employees who work in the facility(s) or operating unit(s) and those who lose their jobs as the direct result of the shutdown(s) are to be counted in determining when a plant closing has occurred. 20 C.F.R. § 639.3(b) (1989). For example, if the forty-five (45) worker computer data entry department at the plant is closed and, as a direct result of the closing (and within thirty (30) days of the closing), five (5) computer programmers are terminated, a covered plant closing has occurred. 20 C.F.R. § 639.3(b) (1998).

The DOL regulations further explain that "[a]n employment action that results in the effective cessation of production of the work performed by a unit, even if a few employees remain, is a shutdown." Id. § 639.3(b) (2002).

(a) Case Law

(i) Rowan v. Chicago Hous. Auth., 149 F. Supp. 2d 390 (N.D. Ill. 2001).

Two class action plaintiffs, police officers formerly employed by the defendant Chicago Housing Authority ("CHA"), sued the CHA to recover damages they suffered when the CHA terminated their employment as part of a reduction in force. The plaintiffs alleged that the CHA violated the WARN Act by terminating their employment without adequate notice.

The court concluded that CHA's action was not a plant closing within the meaning of the WARN Act. The plaintiffs admitted that the CHA did not shut down any of its five sites in connection with the reduction in force. Based on this fact alone, the requirement of a "permanent or temporary shutdown" of a single site or of one or more facilities within a single site was not met. Moreover, the plaintiffs' argument that the defendant's reduction in force constituted a plant closing because it affected more than fifty (50) employees misconstrued the WARN Act. The court emphasized that the Act *first* defines a plant closing as a temporary or permanent shutdown of a single site or operating unit within a single site of employment and *second* imposes a requirement that the shutdown affect at least fifty (50) or more full time

employees. See 20 U.S.C. § 2101(a)(2). Contrary to the plaintiffs' assertion, the Act does not state that a layoff of fifty (50) or more employees from a single site, alone, qualifies as a plant closing.

(ii) Pavao v. Brown & Sharpe Mfg. Co., 844 F. Supp. 890 (D. R.I. 1994).

An industrial products manufacturer "shut down" its consolidated parts department which constituted a "plant closing." The manufacturer decentralized and dissolved the department which was a single site of employment and an operating unit because it had its own managers, its own separate budget and its own separate workforce. The manufacturer considered the consolidated parts department to be a separate organizational unit and it planned and executed a shutdown of that organizational unit.

The court found that the manufacturer's argument that a shutdown did not occur because some of the work of the consolidated parts department was picked up by other operating units was without merit because the department was a single site of employment and an operating unit, the department was shut down and at least fifty (50) full-time employees lost their jobs within a thirty (30) day period.

2. Definition of Mass Layoffs

A covered employer must give the required notice if there is to be a "mass layoff" which does not result from a plant closing, but which will result in an "employment loss" at a "single site" of employment during any thirty (30) day period for (1) 500 or more employees or (2) 50-499 employees if they make up at least thirty-three percent (33%) of the employer's active workforce. Part-time employees are not counted when determining if this threshold is met.

3. Definition of Single Site of Employment

The term "single site" of employment refers to either a single location or a group of contiguous locations. The common thread in determining a single site appears to be a sufficient degree of geographic contiguity as well as an operational connection. Thus, separate buildings not directly connected may be considered a "single site" of employment if they are in reasonable

geographic proximity, used for the same purpose and share the same staff and equipment. Ramos Pena v. New Puerto Rico Marine Mgmt., Inc., 84 F. Supp. 2d 239 (D. P.R. 1999).

(a) Case Law

(i) Int'l Union, United Mine Workers v. Jim Walter Res., Inc., 6 F.3d 722 (11th Cir. 1993The court held that the WARN Act did not apply to four mines operated by the same company, despite the fact that the four mines were geographically contiguous. Two of the mines were connected underground, coal was moved from one to another and the company's central office exercised significant control and authority over each site. Nonetheless, the court held that because each mine had its own complement of employees and its own organizational and operational management team, the mines were not a single site. The court also noted that while exceptions existed, the employees did not regularly rotate among the mine sites or work at more than one mine.

(ii) Williams v. Phillips Petroleum Co., 23 F.3d 930 (5th Cir. 1994).

The court found that layoffs at the employer's three facilities in Oklahoma, Houston and Washington, D.C., did not trigger the WARN Act because a single site was not involved. The court stated that although "single site" was not defined by law, it was "not plausible, under any reasonable or good faith reading of the regulations, that the Houston and [Oklahoma] plants -- located in different states and hundreds of miles apart -- could be considered a single site" for purposes of the WARN Act."

4. Definition of Facility or Operating Unit Within A Single Site of Employment

According to the DOL, facility means building, and operating unit means product, task, or work function within or across facilities at a single site of employment. 20 C.F.R. § 639.3(j). For example, the supplementary information accompanying the DOL's proposed rule states that elimination of a department would constitute closure of an "operating unit," but elimination of a night shift where the employer continues to perform the

work function on other shifts would not meet the definition of a "plant closing."

5. Definition of Part-Time Employees

A part-time employee is defined as an employee who is employed for an average of less than twenty (20) hours per week or an employee who has been employed on a full-time or part-time basis for less than six of the twelve (12) months preceding the date on which the law requires that notice be given. Part-time employees are not counted for purposes of determining whether notice is required, but if notice is required then part-time employees are entitled to notice.

6. Definition of Employment Loss

The term "employment loss" means (a) the termination of employment other than a discharge for cause, a voluntary departure, or a retirement; (b) a layoff in excess of six (6) months; or (c) a reduction in hours of work of more than fifty percent (50%) during each month of any six (6) month period. 29 U.S.C.A. § 2101(a)(6).

(a) Case Law

(i) Hollowell v. Orleans Reg'l Hosp. L.L.C., 217 F.3d 379 (5th Cir. 2000).

When aggregating employment losses, the provision of the WARN Act allowing courts to consider "employment losses for two or more groups at a single site of employment, each of which is less than [fifty (50) employees] does not preclude counting an employee who is the only one laid off on a particular day, on the ground that an individual cannot constitute a 'group.'"

(b) Full Employment Status

The DOL takes the position that in the case of a layoff or termination, an employment loss occurs upon the loss of full employment status meaning full pay, benefits and other employment entitlements. This concept is intended to exclude employees who lose a particular job but otherwise retain full employment status. The DOL states that the payment of termination or separation benefits otherwise due, such as severance pay or supplemental

unemployment benefits, will not serve to continue full employment status.

(c) Sale of Business

Under Section 2101(b)(1) of the WARN Act, the seller has the responsibility for giving notice of a plant closing or mass layoff related to a sale of the business up to and including the effective date of the sale, and the buyer has the obligation to give notice of closings or layoffs which take effect thereafter. The statute also states that for purposes of the WARN Act, employees of the seller at the time of sale are deemed to become employees of the buyer.

The effect of these provisions is to establish a limited exception to the notice requirement for employees who necessarily will be terminated from the seller's employ when the seller transfers ownership of the business. If the buyer does not employ the seller's workforce at the time of purchase, or thereafter effects a closure or reduction in force, the buyer will have a notice obligation under the WARN Act if the employer coverage and employment loss thresholds are met.

(i) Case Law

a. Dingle v. Union City Chair Co., 134 F. Supp. 2d 441 (W.D. Pa. 2000).

The termination of more than 100 furniture company employees following the sale of the company's assets did not trigger the notice requirements of the WARN Act, where all but twenty-two (22) employees were rehired by the purchaser on the first business day after the sale. Rehired employees could not be counted towards "employment loss" of fifty (50) employees required to trigger notice provisions under the Act.

(d) Business Consolidations and Relocations

Section 2101(b)(2) of the WARN Act states that no employment loss occurs if a plant closing or mass layoff results from a business relocation and consolidation and the employees in question receive offers to transfer which satisfy either of the following requirements:

(i) Before the closing or layoff, the employer offers to transfer the employee to a different location that is within reasonable

commuting distance and the employee will not experience a break in employment of more than six months. The meaning of the term "reasonable commuting distance" will vary with local and industry conditions. In determining what is a "reasonable commuting distance," consideration should be given to the following factors: geographic accessibility of the place of work, the quality of the roads, customarily available transportation and the usual travel time. 20 C.F.R. § 639.5(b)(3) (2002); *or*

(ii) The employer offers to transfer the employee to a different location, regardless of distance, with no more than a six (6) month break in employment and the employee accepts the offer within thirty (30) days of the offer or the closing or mass layoff, whichever is later.

7. Determination of the Number of Employees Who Will Suffer Employment Loss

(a) Look to the effect at the single site of employment or facility or operating unit within the single site of employment to determine whether the threshold number of employees will be affected. For example, the regulations state that if the closure of a department results in the elimination of thirty-five (35) positions in that department, but also causes fifteen (15) employees in other parts of the plant to lose their jobs, the action will not trigger the notice requirements.

(b) Part-time employees are not counted for purposes of determining whether notice is required, but if notice is required, part-time employees are entitled to notice.

(c) Only incumbent employees in jobs being eliminated are counted, but if notice is required, employees whom the employer reasonably foresees will lose their jobs due to bumping or other similar systems are also entitled to notice.

8. Ascertainment of Time Period In Which Employment Losses Occur

The WARN Act specifies two time frames to insure that employers do not avoid application of the law by staggering the dates of terminations or layoffs.

First, the terms "plant closing" and "mass layoff" are defined to include terminations or layoffs during any thirty (30) day period. Thus, the employer should look ahead thirty (30) days and behind thirty (30) days to determine whether their actions both taken and planned will, in the

aggregate for any thirty (30) day period, trigger the WARN Act requirements. Id. § 639.5(a)(1)(i).

Additionally, Section 2102(d) of the Act states that a plant closing or mass layoff will have occurred if employment losses for two or more groups at a single site of employment, each of which is less than the minimum employment loss threshold under the statute but which together exceed that threshold, occur within any ninety (90) day period. Thus, the employer should look ahead ninety (90) days and behind ninety (90) days to determine whether employment actions both taken and planned each of which separately is not adequate to trigger WARN Act coverage will, in the aggregate for any ninety (90) day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement. Id. § 639.5(a)(1)(ii).

Thus, an employer who engages in multiple closings or layoffs at a single site each of which separately does not satisfy the numerical threshold for coverage, may be covered by the WARN Act. However, the employer will not be required to give notice if it can show the termination of the two groups resulted from separate and distinct actions and causes and are not an attempt to evade the requirements of the law. Id.

When all employees are not terminated on the same date, the date of the first individual termination within the statutory thirty (30) day or ninety (90) day period triggers the sixty (60) day notice requirement. 20 C.F.R. § 639.5(a)(1). The date of that worker's layoff is the worker's last day of employment. Id. Both the first and each subsequent group of terminees are entitled to a full sixty (60) days notice.

9. Temporary Projects Exemption

The notification requirements do not apply to the closing of a temporary site or to the plant closing or mass layoff resulting from the completion of a temporary project if the employees were hired with the clear understanding that their employment was limited to the duration of the site or project.

10. Strike or Lockout Exemption

The notification rules do not apply if a plant closing or mass layoff is the direct result of a strike or constitutes a lockout that is not intended to evade the requirements of the law. Moreover, an employer need not provide notice when permanently replacing an economic striker pursuant to the National Labor Relations Act.

D. Notice Requirements

1. Sixty (60) days notice must be provided to the following individuals and groups:

(a) Each affected employee defined as employees who may reasonably be expected to experience an employment loss, including part-timers, but excluding temporary workers and independent contractors;

(b) Where applicable, their union representative defined as an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act;

(c) The state dislocated worker unit defined as a unit designated or created in each State by the Governor of that State;

(d) The chief elected official of the unit of local government within which such closing or layoff will occur. The Act defines "chief elected official" as the highest elected official of the local unit of government where the plant is located, or the chairperson of the local governing board, where such boards comprise the unit of local government. The Act defines "local government unit" as the unit of government that has jurisdiction where the plant closing or layoff will occur.

In areas with both city and county government, employers must notify the one to which the company directly paid the most taxes for the year preceding the year the closing or layoff occurs. Employers should count all local taxes directly paid to each local government, to determine which they must notify. However, it is best to notify both. Notices to chief elected local officials should contain the same information as notices to state dislocated worker units (see below);

(e) Management and supervisors are entitled to notice, but business partners, consultants or contractors who are not legally employees of the employer are not entitled to notice; and

(f) Part-time employees are entitled to notice even though they are not counted in determining whether the employer coverage and employment loss thresholds have been met.

2. Who Gives Notice

(a) The employer who is anticipating carrying out a plant closing or mass layoff is required to give the required notice. It is the responsibility of the employer to decide the most appropriate person within the employer's organization to prepare and deliver the notice.

(b) The responsibility to notify workers whose employment will terminate as a result of the sale remains with the seller up to and including the effective date and time of the sale and is then assumed by the buyer. If the seller is made aware of definite plans on the part of the buyer to carry out a plant closing or mass layoff within sixty (60) days of purchase, the seller may give notice to affected employees as an agent of the buyer, if so empowered. If the buyer is silent with respect to his plans for the workforce, and fails to employ the employees or effects a plant closing or mass layoff within sixty (60) days of the sale, the buyer is responsible for giving notice.

3. Form of Notice

(a) No particular form of notice is required. However, all notices must be in writing.

(b) Any reasonable method of delivery designed to ensure receipt sixty (60) days before the closing or layoff is acceptable.

(c) First class mail, personal delivery and inclusion in employee pay envelopes are all satisfactory means of giving notice.

4. Contents of Notice

(a) Notice to affected employees must provide:

(1) Writing in a language that affected employees understand. This may require having notices in a language other than

English, depending on the composition of the company's workforce, or its equal employment opportunity or affirmative action obligations;

(2) A statement as to whether the termination is temporary or permanent and, if applicable, a statement that the entire plant is to be closed;

(3) The expected date of the first termination and the expected date of termination of the individual employee recipient where the regulations allow the employer to use specific dates or a fourteen (14) day period during which a separation or separations are expected to occur;

(4) The name and telephone number of a company official from whom additional information may be obtained;

(5) A statement as to whether bumping or transfer rights exist;

(6) The company's best estimate of how long the action will last in the case of temporary employment actions; and

(7) Details on where workers can obtain information on dislocated worker assistance. To meet this requirement, employers can tell workers to contact the state employment service.

(b) Notice to union representatives (if applicable) must provide:

(1) The name and address of the site where the employment loss will occur and the name and telephone number of a company official from whom additional information may be obtained;

(2) A statement as to whether the termination is a plant closing or mass layoff and whether it is expected to be temporary or permanent;

(3) The expected date of the first separation and the anticipated schedule for making separations;

(4) The job titles of affected positions and the number of affected employees in each job classification;

(5) A description of applicable bumping rights, if any; and

(6) Identification of any representatives of other affected employees.

(c) Notice to the state dislocated worker unit and unit of local government must provide:

(1) The name and address of the site where the employment loss will occur and the name and telephone number of a company official from whom additional information may be obtained;

(2) A statement as to whether the termination is a plant closing or mass layoff and a statement of whether the planned action is expected to be permanent or temporary and, if temporary, the expected duration;

(3) The expected date of the first separation and the anticipated schedule for making separations;

(4) The job titles of affected positions and the number of affected employees in each job classification;

(5) If applicable, the name of each union that represents affected employees and the name and address of the chief elected officer of each union; and

(6) A statement as to whether bumping rights exist.

5. Additional Notice

Additional notice is required when the dates of a planned plant closing or mass layoff are extended beyond the date announced in the original notice.

(a) If the delay is less than sixty (60) days from the originally scheduled date, the additional notice must refer to the earlier notice, the date to which the planned action is postponed and the reasons for postponement.

(b) If the postponement is for sixty (60) days or more from the originally scheduled date, a new set of notices is required. Routine or periodic notice, given whether or not a plant closing or mass layoff is impending, is not acceptable.

E. Exceptions to the Notice Requirements

The WARN Act recognizes three situations in which an employer may dispense with the sixty (60) day notice rule. However, the regulations recognize the employer must give as much notice as is practicable, and the employer must provide a statement of the basis for reducing the sixty (60) day notification period in its notice.

1. Faltering Company

This exception, which only applies to plant closings, covers situations where a company has sought new capital or business in order to stay open and where giving notice would preclude the opportunity to get the new capital or business. Under this exception, a covered employer may shut down a single site of employment without the required sixty (60) day notice if (1) the employer is actively seeking capital or business which, if obtained, would allow the employer to avoid or postpone the shutdown and (2) the employer has a reasonable and good faith belief that giving the required notice would preclude the employer from obtaining the needed capital or business.

2. Unforeseeable Business Circumstances

An employer may order a plant closing or mass layoff without the sixty (60) day notice if the action is necessitated by circumstances which were not reasonably foreseeable at the time the sixty (60) day notice would have been required. A business circumstance is not reasonably foreseeable if it is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control.

Some examples of unforeseeable business circumstances include the termination of a major contract, a strike at a major supplier, an unanticipated and dramatic major economic downturn or a government ordered closing of an employment site that occurs without prior notice. 20 C.F.R. § 639.9(b)(2) (2002).

The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services. Id.

3. Natural Disaster

If a plant closing or mass layoff is the direct result of a natural disaster, a covered employer need not give advance notification. Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision. Id. § 639.9(c)(1). To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster. Id. § 639.9(c)(2).

F. Penalties for Violating the WARN Act

1. Employers cannot be enjoined from closing a facility for failure to comply with the WARN Act. However, an employer who violates the WARN Act requirements by ordering a plant closing or mass layoff without providing the appropriate notice is liable to each aggrieved employee for an amount including back pay and benefits for the period of the violation, up to sixty (60) days.

(a) Back pay for each day of the violation includes only work days. It is computed at the higher of the employee's average regular rate during the last three years of employment or the employee's final regular rate.

(b) Under the employee benefit plans described in ERISA, each aggrieved employee who suffers an employment loss due to a plant closing or mass layoff without proper notification receives benefits, including but not limited to medical expenses during the employment loss that would have been covered under the employee's benefit plan.

(c) The period of liability is the period of violation, up to a maximum of sixty (60) days. There is a special rule that only allows the penalty to be assessed for a period that is less than or equal to one half of the number of days that the particular employee was employed by the employer. For example, if an employee was employed only ninety (90) days at the time of a plant closing or a mass layoff that was conducted without complying with the law, the employee would be limited to penalties for a period of no more than forty-five (45) days.

(d) The employer's liability may be reduced by wages paid by the employer to the employee during the period of the violation, any voluntary and unconditional payments that the employer provided to

the employee that were not required by a legal obligation and any payment by the employer to a third party or trustee on behalf of or attributable to the employee for the period of violation (e.g., premiums on behalf of the employee for health benefits or payments to defined contribution pension plans).

(e) Case Law

(i) Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152 (9th Cir. 2001).

"Back pay" which hotel casino employees were required to recover under the WARN Act, for each day of violation after the casino operator gave only forty-five (45) days notice that the casino would be closed, rather than the sixty (60) days notice required under the WARN Act, included not only what employees would have made directly from the casino, but also what they would have received in tips. "Back pay" also included the holiday pay that employees would have received for working on the July 4th holiday, which fell more than forty-five (45) days after the closing was announced, but less than sixty (60) days after the announcement.

2. Civil Penalty

Employers who fail to comply with the notice requirements to a unit of local government may be assessed a civil penalty of up to $500 for each day of the violation. This penalty may be avoided if the employer satisfies the liability to each aggrieved employee within three weeks after the closing or layoff is ordered by the employer.

3. Court Discretion

Courts may exercise discretion in order to reduce the amount of liability or penalties provided by law. If an employer proves that the unlawful act or omission was in good faith and that the employer had reasonable grounds to believe that the act or omission was not unlawful then the court has the authority to exercise such discretion.

4. Enforcement

Enforcement of the WARN Act requirements is through the United States district courts. Employees, employee representatives, and units of local government may bring individual or class action suits. In any such suit, the

court, in its discretion, may allow the prevailing party reasonable attorney's fees as part of any recovery.

5. Procedures in Addition to Other Rights of Employees

The rights and remedies provided to employees under the WARN Act are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of employees, and are not intended to alter or affect such rights and remedies.

(a) Case Law

(i) United Mine Workers of Am. Int'l Union v. Martinka Coal Co., 45 F. Supp. 2d 521 (N.D. W. Va. 1999).

Unionized coal miners laid off without notice in violation of the WARN Act were entitled to receive as damages compensation they otherwise would have received, under the collective bargaining agreement, during the statutory sixty (60) day notice period, including vacation and holiday pay and health care coverage, even though such compensation exceeded the minimum requirements of the WARN Act.

6. Authority of Union to Sue

The WARN Act grants a union authority to sue for damages on behalf of its members. Because there is no provision for liability to the union itself, any liability sought by the union must be liability to its employee-members. United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 116 U.S. 1529 (1996).

Additional Responsibilities for Employers: **Employees Represented by Union**s

If employees affected by a reduction in force are represented by a union, both federal labor law and applicable collective bargaining agreements must be considered before the implementation of the reduction in force. In general, federal labor law requires an employer to bargain in good faith with representatives of its bargaining units over mandatory subjects of bargaining. Even if a proposed course of action is not itself a mandatory bargaining subject, in other words, it is not subject to a "decisions" bargaining requirement, its effects can be mandatory bargaining subjects.

A. Employers Obligation to Bargain Over the Decision to Layoff Employees

Certain reduction in force decisions are mandatory subjects of bargaining both as to the decision itself and its effects. For example, deciding to subcontract is a mandatory subject of bargaining. See, e.g., Century Air Freight, Inc., 284 N.L.R.B. 730, 735 (1987). On the other hand, deciding to close all or part of a business is only subject to an effects bargaining requirement. First Nat'l Maint. Corp. v. N.L.R.B., 452 U.S. 666, 686. There is a gray area in between, in which both types of bargaining may or may not be mandatory depending on the circumstances.

For example, the decision to do a layoff may be a mandatory subject of bargaining if labor costs motivate the decision, but if the layoff decision is merely the result of a larger economically motivated business decision like a change in production resulting in a plant closure, the duty to bargain over the decision to do a layoff does not arise. See N.L.R.B. v. Advertisers Mfg. Co., 823 F.2d 1086, 1090 (7th Cir. 1987). However, the duty to bargain over the effects of such a layoff would exist.

1. Collective Bargaining Agreement in Effect

Section 8(d) of the National Labor Relations Act ("N.L.R.A.") provides that one element of the duty to bargain is that when a collective bargaining agreement is in effect, neither party may unilaterally "terminate or modify such [agreement]." Thus, if there is a provision in the agreement which prohibits the closing or relocation of a plant or the implementation of a reduction in force the employer would violate the N.L.R.A. by proceeding with such a transaction during the term of the agreement without the union's consent, even after bargaining to impasse. See, e.g., Brown Co., 278 N.L.R.B. 783 (1986).

An existing collective bargaining agreement may also determine how reduction in forces are to be effected. For example, the collective bargaining agreement in effect may specify the criteria, for example, seniority, to be used in conducting layoffs due to a lack of work. However, if there are adequately explicit "management rights" clauses in collective bargaining agreements, a union's statutory bargaining rights for reduction in force related decisions can be waived. See, e.g., Borg-Warner Corp., 245 N.L.R.B. 513, 518 (1979).

B. Employer's Obligation to Bargain over the Effects of a Layoff

> The consequences to bargaining unit employees in layoff decisions normally are a mandatory effects bargaining subject, whether or not bargaining is required with respect to the decision itself. Kirkwood Fabricators, Inc. v. N.L.R.B., 862 F.2d 1303, 1306 (8th Cir. 1988). For example, "effects bargaining" is required for layoff benefits, transfer rights, recall rights and similar matters. The National Labor Relations Board has held that an employer cannot grant exit incentives to employees directly except by agreement with their union because it would violate the duty to bargain with the union. Toledo Typographical Union No. 63 v. N.L.R.B., 907 F.2d 1220, 1222 (D.C. Cir. 1990), cert. denied, 498 U.S. 1053 (1991).

Effects bargaining also allows a union to monitor whether a reduction in force decision is "purely economic" or whether the decision was motivated by the company's desire to rid itself of union workers. First Nat'l Maint. Corp. v. N.L.R.B., 452 U.S. 666, 682 (1981). Thus, the union "has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered" and not "motivated by an intent to harm a union." Id.

ACCA ANNUAL MEETING 2002

LAYOFFS, DOWNSIZING AND RIF'S

EMPLOYEE TERMINATION CHECKLIST

Presented By:

V. Scott Kneese
Nancy Morrison O'Connor
Bracewell & Patterson, L.L.P.

Privileged and Confidential Attorney-Client Communication
Work product; Prepared in Anticipation of Litigation

DATE: _____

TO: _____

FROM: V. Scott Kneese
Nancy Morrison O'Connor

Re: Reductions in Force; Employee Interviews

In order to organize your individual termination interviews with employees affected by the reductions in force, we are providing this checklist of items for preparation for your meetings with the individual employees and your comments at those meetings.

1-2 days prior to interviews:

_ Identify any outstanding projects by the affected employees and arrange for the employees to provide their supervisors with a complete status report before the interviews and/or arrange alternate staffing for these projects.

_ Arrange for individual interviews, regardless of whether there is also a group meeting. Arrange the schedule and location of the individual meetings with affected employees, leaving an appropriate interval for private transition between interviews. Ensure employees are scheduled to work in or report to the office on these dates and at these times; identify how to contact each for a meeting. Arrange with your assistant/receptionist to prevent calls and visitors during this period. Consider scheduling meetings at a private location in the building or their supervisor's office.

_ Ascertain available security for that day and time and how to secure it in the event you encounter a problem during the interviews.

_ Arrange for management personnel to meet in your office 10-15 minutes early on the days of the interviews to review the agenda and document(s); designate one manager to be the designated note taker and one the speaker unless the speaker directly asks the other manager a direct question.
_ Arrange for the calculation of the wages/salary owed to the laid off employees to date, along with any accrued leave or other payments (pro rata bonus, etc.) and have the check(s) ready.

_ Determine whether there are any reimbursement requests for any adversely affected employee and have them prepared; place these in a separate envelope with the wages/salary/accrued leave-to-date check(s).

_ Identify any Company property any employee has and compile a list; identify exit procedures and make arrangements for the forms and other materials (benefits continuation information, etc.) to be ready before the interviews; make arrangement for the immediate termination of security cards, direct deposit, credit cards, passwords, computer access, client representations, etc.

_ Before the interviews, review any employment contracts and offer letters to employees for any additional considerations; also review Company policy re severance and references and make appropriate calculations and prepare any checks. Prepare to be able to explain these policies at the termination interview or have copies of the policies available to hand to the employee.

_ Assemble the documentation (termination of employment letter, notice of termination of employment contract under the terms of the contract [only if there is a contract of employment], releases) and checks; review the documentation carefully before presentation and then place in a separate envelope; call if you have any questions about any of the terms of the agreement.

The day of the interviews

_ Meet with management personnel attending the interviews at the designated office 10-15 minutes prior to the first scheduled interview (no coffee, etc. at the meeting).

_ Have the documentation and checks available in separate envelopes and ready before the meetings.

At the interviews:

_ Tell the employee:

- the basis for the reason for the layoff, e.g. you have carefully reviewed the productivity reports of the employees and the available work at the company, and you have determined to reorganize, eliminating this employee's position. This will be effective(date). **Do not profess ignorance of why this decision was made or who made it. Do not say you disagree with it. Do not blame it on "corporate" or any other person or entity.** The whole purpose of this interview is to provide the employee information, answers, resources and personal attention.

- that you have prepared a check which represents the employee's wages/salary through the end of this [day/week/pay period/month] and accrued leave through (date) [and expense reimbursements requested and approved to date, applicable severance (if any is applicable) and any other payments due].

- that the Company is also prepared to offer the employee an additional payment of $_____to assist in his/her transition as the employee moves forward.

- that, in order for the company to put this decision behind it as well, the company is taking this extraordinary step of providing this additional payment; as a matter of policy we require a release and have prepared the appropriate documentation.

- that this agreement recites the proposed additional payment as you have described and recites the release and certain other promises from the employee.

- that these promises include his/her promises to keep confidential this termination agreement, his/her promise to maintain this agreement confidential and his/her promise not to make derogatory comments about the company.

- that he/she should be aware that this offer is dated and effective as of today, regardless of the date upon which he/she may actually sign the agreement, and that any breach of the confidentiality agreements or the non-disparagement provisions will void the offer.

- that he/she should read the entire agreement carefully before making a decision or speaking with anyone other than an attorney concerning the termination of employment to avoid an inadvertent breach of the offer which would void it.

- that, if he/she has any questions concerning the agreement, he/she should contact only you or an attorney, should he/she desire one.

- that, under the terms of the offer, the employee has until _____ [or 21 days for the employee over 40, although he/she does not need to take this full time] to sign and return the agreement; if we have not received the document by then, we withdraw the offer and there will be no additional compensation from the Company.

- [**For employees with contracts only:** As provided under the terms of the agreement with the employee, you are terminating the contract effective _____ [quote provisions or use the language of the agreement]. This should also be included in the termination letter, as noted above.

- that you appreciate his/her services provided to date.

- that, if he/she has any questions about matters other than the agreement, for example, about benefits questions, whom he/she should contact (HR, Business Manager, insurance carrier, etc.) and have appropriate telephone information.

_ Secure from the employee the identified Company property and make arrangements for the immediate return of any additional property.

_ Arrange for the employee to retrieve any personal belongings from his/her office/locker, etc. or arrange for a return to the company at a designated time and place.

_ Although you want to avoid an extensive discussion regarding this termination or the reasons therefor, you should avoid an express refusal to state the reasons for your action. This would not play well in front of a reviewing jury or governmental agency. Briefly explain you decision and ask for any specific questions. You can agree to get back to the employee if you really don't know the answer to a question; do not guess and do not argue.

_ If the employee asks about a reference, advise him/her that we will comply with company policy [explain the company policy, e.g. we will verify the dates of employment and the final position only. Unless he/she specifically requests us and releases us to provide additional information or unless it is required by law, we will not release the reason for termination or his/her wage rate, salary or any other information].

_ Conclude the interview promptly and wish the employee good luck in his/her future efforts. **If you are uncomfortable at any time with the conduct of the meeting because of any action or statement by the employee, terminate the meeting immediately and instruct him/her to leave the property immediately, instruct him/her not to return and advise him/her that we will mail any personal belongings. Do not argue or return/respond to any threats or allegations.**

_ Make any additional arrangements for any removal of personal belongings from the company.

_ Make arrangements for the prompt and accurate transcription of meeting notes and signatures by all managers present; prepare them in the form of a memo to me (no cc's which would destroy the privileged nature of the communication) and forward to me promptly.

These interviews, of course, will be neither easy nor fun. If you are prepared -- and you will be -- you will not be surprised, you will demonstrate that this was a thoughtful if not a popular decision that you had the right and the need to make and you will handle this well.

DISCRIMINATION CLAIMS ARISING FROM REDUCTIONS IN FORCE

by
Kathlyn E. Noecker[1]

Age discrimination is the most commonly alleged type of discrimination in the context of a reduction in force (RIF), and these materials therefore focus primarily on age discrimination claims. Nevertheless, employers should review RIF decisions to avoid discriminatory treatment and adverse impact based on each protected characteristic. Applicable laws include the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., (ADEA) (age); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (race, color, religion, sex, national origin); the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA) (disability); and the Immigration Reform and Control Act, 8 U.S.C. § 1324b (IRCA) (national origin, citizenship status). Claims may also be asserted challenging a RIF on the basis of state human rights or anti-discrimination laws.

There are two main types of discrimination claims: disparate treatment claims and disparate impact claims. Disparate treatment claims examine the employer's intent or motive in taking adverse employment action. By contrast, the disparate impact claim does not require an analysis of the employer's motive. Instead, disparate impact claims focus on the discriminatory effect that a facially neutral policy has on a protected group.

I. Proof and Defense of Disparate Treatment Claims

The disparate treatment claim examines the employer's intent or motive. The disparate treatment claim is designed to protect members of a class from adverse treatment because of their membership in the class.

A. General Principles

In McDonnell Douglas Corp. v. Green, 411 U.S. 793, 93 S. Ct. 1817 (1973), the Supreme Court presented a series of guidelines for courts to resolve disparate treatment claims in employment discrimination cases. Although McDonnell Douglas was a Title VII case, it has been held to apply to employment discrimination cases under other statutes as well. In particular, McDonnell Douglas applies to the ADEA. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141-42, 120 S. Ct. 2097, 2105 (2000) (not specifically holding that McDonnell Douglas applies to ADEA, but noting that parties did not dispute its applicability, citing cases in accord from every Circuit Court of Appeals, and deciding case on assumption that McDonnell Douglas applies). It also applies to the ADA. See, e.g., Gillen v. Fallon Ambulance Service, 283 F.3d 11 (1st Cir. 2002) (applying

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McDonnell Douglas to ADA); Nawrot v. CPC Intern., 277 F.3d 896 (7th Cir. 2002) (same); Wascura v. City of South Miami, 257 F.3d 1238 (11th Cir. 2001) (same); Selenke v. Medical Imaging of Colorado, 248 F.3d 1249 (10th Cir. 2001) (same); Duncan v. Washington Metropolitan Area Transit Authority, 240 F.3d 1110 (D.C. Cir. 2001) (en banc) (same), cert. denied, 122 S. Ct. 49; Snead v. Metropolitan Property & Cas. Ins. Co., 237 F.3d 1080 (9th Cir. 2001) (same), cert. denied, 122 S. Ct. 201.

Under McDonnell Douglas, the court examines the claim by the use of a three-step "judicial minuet" in which the burden of production rests first on the plaintiff to establish his prima facie case, then on the defendant to "articulate some legitimate nondiscriminatory reason for the employee's rejection," McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824, and finally again on the plaintiff to show that the defendant's reasons were pretextual. Id. at 804, 93 S. Ct. at 1825; see Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093 (1981). Despite the shifting burdens of production, the plaintiff bears the burden of persuasion at all times. Id.; see also St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-12, 113 S. Ct. 2742, 2749 (1993) (employer's burden is one of production only).

The requirements for a prima facie case vary depending on the facts of the claim. In the failure-to-hire race discrimination claim at issue in McDonnell Douglas, the Court stated that the plaintiff could make out a prima facie case by showing that he met four specific criteria.[2] However, the Court "did not purport to create an inflexible formulation" for a prima facie case, Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 358, 97 S. Ct. 1843, 1866 (1977), noting instead that "[t]he facts necessarily will vary … and the specification above of the prima facie proof required … is not necessarily applicable in every respect to differing factual situations." McDonnell Douglas, 411 U.S. at 802 n.13, 93 S. Ct. at 1824 n.13.

There is therefore no set test that applies to every case of alleged discrimination, but the requirements may be generalized as follows: to make out a prima facie case of employment discrimination, the plaintiff must show (i) that he or she is a member of a protected class; (ii) who suffered adverse job action; (iii) under circumstances giving rise to an inference of unlawful discrimination. Typically these circumstances include a requirement that the plaintiff show that he or she was qualified for the job in question and/or was performing it adequately. See, e.g., Reeves, 530 U.S. at 142, 120 S. Ct. at 2106 (recognizing prima facie case in age discrimination case when qualified over-40 plaintiff was fired and replaced by persons under 40); O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 & n.2,

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[2] The criteria were:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824.

116 S. Ct. 1307, 1309-10 & n.2 (1996); Burdine, 450 U.S. at 254 n.6, 101 S. Ct. at 1094 n.6 (recognizing prima facie case in sex discrimination case when qualified woman sought an available position, but position was left open for several months before being filled by male under her supervision); McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824 (recognizing prima facie case in race discrimination case where qualified black applicant was rejected for available job); see also Int'l Brotherhood of Teamsters, 431 U.S. at 358, 97 S. Ct. at 1866 (prima facie case must "create an inference that an employment decision was based on a discriminatory criterion illegal under the Act"). The burden of making out a prima facie case "is not onerous." Burdine, 450 U.S. at 253, 101 S. Ct. at 1094.

If the employer proffers a legitimate business reason(s), the plaintiff must demonstrate by a preponderance of the evidence that the employer's articulated reasons were a pretext for discrimination. Id. at 253, 101 S. Ct. at 1093. To prove pretext, the plaintiff must prove not only that the employer's proffered legitimate business reasons were not true, but that discrimination was the real reason for the adverse employment action. St. Mary's Honor Center, 509 U.S. at 507-12, 113 S. Ct. at 2749 (even if fact-finder disbelieves employer's articulated reason, plaintiff does not prevail unless the ultimate issue of discrimination is proved).

The McDonnell Douglas framework just described is inapplicable, however, "where the plaintiff presents direct evidence of discrimination." Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S. Ct. 613, 621-22 (1985). "The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence." Id. at 121, 105 S. Ct. at 622 (internal brackets and quotation marks omitted). Direct evidence of discrimination, as opposed to circumstantial evidence, is evidence that "if believed, proves the existence of a fact in issue without inference or presumption….[D]irect evidence is composed of only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of some impermissible factor." Rojas v. Florida, 285 F.3d 1339, 1342 n.2 (11th Cir. 2002); see also Chiaramonte v. Fashion Bed Group, Inc., 129 F.3d 391, 396 (7th Cir. 1997) (direct evidence "must relate to the motivation of the decision maker") (quoting Cheek v. Peabody Coal Co., 97 F.3d 200, 203 (7th Cir. 1996)).[3] Direct evidence is "powerful" and rare. Jones, 151 F.3d at 1323 n.11; see also Chiaramonte, 129 F.3d at 396 (McDonnell Douglas "indirect" method of proof "more common").

The difference between direct and indirect evidence is important because direct evidence can support a claim without regard to the burden-shifting framework of McDonnell Douglas. When the plaintiff has direct evidence of discrimination, the burden of persuasion shifts to the employer to demonstrate by a preponderance of the evidence that it would have reached the same employment decision absent any discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228, 276, 109 S. Ct. 1775, 1804 (1989) (O'Connor, J., concurring in

[3] The Courts of Appeals have taken slightly different approaches to the problem of defining the exact characteristics of direct evidence. For a detailed discussion of the cases, see Fernandes v. Costa Brothers Masonry, 199 F.3d 572, 582 (1st Cir. 1999).

judgment) ("[I]n order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show *by direct evidence* that an illegitimate criterion was a substantial factor in the decision.") (emphasis added). Therefore a plaintiff who has direct evidence of discrimination may be able to prevail without proving, for instance, that the plaintiff was performing the job satisfactorily, if the employer fails its burden of proof. See Coco v. Elmwood Care, Inc., 128 F.3d 1177, 1179 (7th Cir. 1997) ("If the plaintiff has other [i.e., direct] evidence of discrimination, well and good; but if he has nothing else … he is out of luck if he can't show that he was meeting his employer's legitimate expectations.").

B. Application to Age Discrimination Claims in RIFs

RIFs are frequently challenged on the grounds that an employee was treated differently from other employees because of his age. Such challenges are based on the ADEA, which prohibits employers from failing to hire, discharging, or otherwise discriminating against any individual because of that individual's age. 29 U.S.C.S. § 623(a) (2002). It applies to persons who are at least 40 years old. § 631(a). An ADEA plaintiff must show that "the protected trait (under the ADEA, age) actually motivated the employer's decision." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706 (1993).

The ADEA grew out of Title VII of the Civil Rights Act of 1964 and, because much of the language of the ADEA parallels that of Title VII, courts have held that the guidelines of proving discrimination under Title VII may be applied in ADEA cases. Therefore, absent direct evidence of discrimination, the plaintiff may attempt to show discrimination circumstantially using the McDonnell Douglas analysis. Although the Supreme Court has not had occasion to rule on this issue, it does not appear to be seriously in dispute. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141-42, 120 S. Ct. 2097, 2105 (2000) (noting that parties did not dispute applicability of McDonnell Douglas to ADEA, citing cases in accord from every Circuit Court of Appeals, and deciding case on assumption that McDonnell Douglas applies); O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 & n.2, 116 S. Ct. 1307, 1309-10 & n.2 (1996) (similar, but omitting citation to First Circuit).

1. Prima Facie Case

Because the Supreme Court has not endorsed particular language applying McDonnell Douglas to the ADEA, the Circuit Courts of Appeals vary as to how they describe the requirements of a prima facie case. A typical requirement is that the plaintiff must establish that:

-- the plaintiff is within a protected age group (e.g., at least 40 years of age);
-- the plaintiff was qualified;
-- the plaintiff suffered an adverse consequence, i.e. discharge; and

-- after the discharge, the plaintiff was replaced with a younger worker or the position remained open and the employer continued to seek applications from persons with similar qualifications.

Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959 (8th Cir. 1978). The prima facie case is not a pleading requirement, see Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S. Ct. 992 (2002), but is required in order to survive summary judgment.

In the context of a workforce restructuring or reduction, however, positions are typically eliminated or duties reassigned, so the last factor of the McDonnell Douglas prima facie case (replacement) is notably absent. To address this absence, the Circuit Courts that have addressed the issue have established other requirements to state a prima facie case. Unfortunately, these requirements are not uniform across the circuits. Nearly all circuits to discuss the issue require that the plaintiff show that he was over 40 years of age, lost his position through the reduction in force, and had been performing the job in a way that met the employer's reasonable qualifications.[4] The other requirements vary by circuit.

In the First Circuit, the requirement is that the employee show he "did not treat age neutrally" or "retained younger persons in the same position." See Suarez v. Pueblo International, Inc., 229 F.3d 49, 54 n.4 (1st Cir. 2000) (employer "did not treat age neutrally"); Woodman v. Haemonetics Corp., 51 F.3d 1087, 1091 (1st Cir. 1995) (employer "did not treat age neutrally or it retained younger persons in the same position").

The Second Circuit does not use a special prima facie test for the RIF context. Instead, the prima facie case for all age-related terminations must include a showing that the "discharge occurred under circumstances giving rise to an inference of discrimination." Tarshis v. Riese Organization, 211 F.3d 30, 35 (2nd Cir. 2000).

In the Third Circuit, the final requirement for a prima facie case of discrimination under the ADEA is that the employer retained workers who were "sufficiently younger than he was at the time of discharge." Showalter v. Univ. of Pittsburgh Medical Center, 190 F.3d 231, 235 (3rd Cir. 1999) (internal quotation marks omitted).

In the Fourth Circuit, RIFs are treated differently based on whether relative performance is the announced basis for selection, that is, whether the RIF is ostensibly being carried out by eliminating poorly-performing employees. See Blistein v. St. John's College, 74 F.3d 1459, 1470 & n.13 (4th Cir. 1996). When performance is not the announced basis for selection, the prima facie case by met by showing "probative evidence that indicated the employer did not treat age … neutrally when making its decision," Causey v. Balog, 162 F.3d 795, 802 (4th Cir. 1998), such as that comparably qualified "persons outside the

[4] The Fourth Circuit takes a somewhat different approach when the RIF is based on relative performance. See Stokes v. Westinghouse Savannah River Co., 206 F.3d 420, 430 (4th Cir. 2000); Mitchell v. Data General Corp., 12 F.3d 1310, 1315 (4th Cir. 1993); see also infra. The Eleventh Circuit also takes a somewhat different approach, which makes the employee's qualifications for other positions relevant. Mitchell v. USBI Co., 186 F.3d 1352, 1354 (11th Cir. 1999); see also infra.

protected class were retained in the same position." Blistein, 74 F.3d at 1470. Note that the Supreme Court has stated in the non-RIF context that "the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the McDonnell Douglas prima facie case." O'Connor, 517 U.S. at 312, 116 S. Ct. at 1310. Instead, "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination." Id. This suggests that in the RIF context, the "persons outside the protected class" criterion might be a questionable one. Instead, a plaintiff might be able to state a prima facie case if the employer retains workers substantially younger than the plaintiff, whether they are in the protected class or not. Cf. Causey, 162 F.3d at 802 n.3 (noting the O'Connor Court's statements about the requirements for a prima facie case).

When performance is the announced basis for selection in a RIF, the Fourth Circuit defines the plaintiff's requirements to state a prima facie case under McDonnell Douglas as:

> (1) he was protected by the ADEA; (2) he was selected for discharge from a larger group of candidates; (3) he was performing at a level substantially equivalent to the lowest level of those of the group retained; and (4) the process of selection produced a residual work force including some persons in the group who were substantially younger than him and who were performing at a level lower than that at which he was performing.

Stokes v. Westinghouse Savannah River Co., 206 F.3d 420, 430 (4th Cir. 2000). This standard focuses both on the age and the performance level of the plaintiff, as compared to those who were not terminated.

In the Fifth Circuit, the final requirement for the prima facie case is simply that the plaintiff was "discharged because of [his or her] age." Bauer v. Albemarle Corp., 169 F.3d 962, 966 (5th Cir. 1999). This standard has also been stated as a requirement that the plaintiff "present evidence that would allow the jury to conclude that [the employer] did not treat age as a neutral factor in its decision as to whether to retain or relocate" the employee. Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 150 (5th Cir. 1995); see also Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 812 (5th Cir. 1991) ("[P]laintiff must produce some evidence that an employer has not treated age neutrally.") (internal quotation marks omitted).

The Sixth Circuit requires that the plaintiff "offer some direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414, 420 (6th Cir. 1999) (internal quotation marks omitted); see also Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 350 (6th Cir. 1998) (nearly identical). Such evidence may include "showing that persons outside the protected class were retained in the same position," Skalka, 178 F.3d at 421, or showing that a "comparable non-protected person was treated better." Ercegovich, 154 F.3d at 350. Of course, O'Connor, 517 U.S. at 312, 116 S. Ct. at 1310, suggests that this test may need to be revised.

Following O'Connor, the criteria should probably be that comparable persons who were substantially younger than the plaintiff were retained.

The Seventh Circuit distinguishes between RIFs and "mini-RIFs." "In a mini-RIF, a single employee is discharged and his position is not filled. However, the employee's responsibilities are assumed by other members of the … workforce." Michas v. Health Cost Controls of Illinois, 209 F.3d 687, 693 (7th Cir. 2000). In a mini-RIF, the plaintiff must only demonstrate "that his duties were absorbed by employees who were not members of the protected class." Id. In a full-scale RIF, however, the plaintiff must show "that there were similarly situated younger employees who were treated more favorably than he was." Id.; see also Lesch v. Crown Cork & Seal Co., 282 F.3d 467, 472 (7th Cir. 2002) ("[S]imilarly situated, substantially younger employees were retained.").

In the Eighth Circuit, the final requirement for a prima facie case under the ADEA is that the plaintiff "must come forward with some additional evidence that age played a role in his termination." Yates v. Rexton, 267 F.3d 793, 799 (8th Cir. 2001); see also Taylor v. QHG of Sprindale, Inc., 218 F.3d 898, 900 (plaintiff "must produce additional evidence to demonstrate age was a factor in her termination"). However, evidence that the employee's duties were redistributed to a younger person "is not circumstantial evidence of discrimination," because "duties have to be redistributed within the employer's remaining workforce." Yates, 267 F.3d at 799.

The Ninth Circuit requires that plaintiff show "through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination." Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000), cert. denied, 533 U.S. 950, 121 S. Ct. 2592 (2001). Plaintiffs may establish this inference "by showing that the employer had a continuing need for their skills and services in that their various duties were still being performed, or by showing that others not in their protected class were treated more favorably." Id. (citations and internal brackets and quotation marks omitted); see also Wallis v. J.R. Simplot Co., 26 F.3d 885, 891 (9th Cir. 1994) (nearly identical). As has been observed in the discussion of other circuits, the element in this standard about "others not in [the] protected class" should probably be revised, in light of O'Connor, 517 U.S. at 312, 116 S. Ct. at 1310, to refer to substantially younger persons.

In the Tenth Circuit, the plaintiff must show that "there is some evidence the employer intended to discriminate against the claimant in reaching its RIF decision." Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1137 (10th Cir. 2000), cert. denied, 531 U.S. 876, 121 S. Ct. 182. This element "may be established through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the RIF." Id. (internal quotation marks and brackets omitted). Such evidence is established if the plaintiff can "point to circumstances that show that the employer could have retained her, but chose instead to retain a younger employee." Id. at 1138. In light of O'Connor, 517 U.S. at 312, 116 S. Ct. at 1310, this should probably be a requirement that the employer retained a substantially younger employee.

The Eleventh Circuit's formulation of the prima facie case differs slightly from those of other circuits in that it allows the employee to show that "he was qualified for his current position or to assume another position at the time of discharge." Mitchell v. USBI Co., 186 F.3d 1352, 1354 (11th Cir. 1999). Thus an employee who was not qualified for his position and was terminated in a RIF might be able to state a prima facie by showing that there were other positions for which he was qualified. In addition, the employee must show that "there is evidence from which a reasonable factfinder could conclude that the employer intended to discriminate on the basis of age in making its employment decision." Id., see also Benson v. Tocco, Inc., 113 F.3d 1203, (11th Cir. 1997) (similar).

The District of Columbia Circuit does not appear to have formulated a special test for the prima facie case under the ADEA in the context of RIFs. The only appellate case in that circuit to touch on the issue of RIFs seems to be Coburn v. Pan American World Airways, Inc., 711 F.2d 339 (D.C. Cir. 1983), in which the Court stated that to make out a prima facie case in general, "a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination was a determining factor in the employment decision." Id. at 342. This can be shown by showing the typical prima facie case under McDonnell Douglas: the plaintiff belongs to the protected group, was qualified, was terminated, and "was disadvantaged in favor of a younger person." Id. The employer in Coburn argued that because the termination was pursuant to a RIF, the plaintiff should be required to produce direct evidence of discrimination at the prima facie stage. The court rejected this reasoning, stating that "the exigencies of the reduction-in-force can best be analyzed at the stage where the employer puts on evidence of a nondiscriminatory reason for the firing." Id. at 343.

2. Non-Discriminatory Reason & Pretext

If the plaintiff establishes a prima facie case under the McDonnell Douglas method, the employer then bears the burden of articulating a "legitimate, non-discriminatory reason" for the termination. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824.[5] If the employer meets this burden, the plaintiff is still left with the ultimate burden of persuading the trier of fact that the plaintiff has been the victim of intentional discrimination, Burdine, 450 U.S. at 256, 101 S. Ct. at 1095, by proving that "the … reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Id. at 252, 101 S. Ct. at 1093.

A legitimate, non-discriminatory reason may be grounded in the use of subjective decision-making, and the court should not substitute its judgment for that of the employer. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 979 (1988) (citations omitted) (a court should not substitute its "subjective judgment"); see also Yates, 267 F.3d at 800 ("The ADEA does not authorize a court to judge the wisdom of a company's business decision to reduce its workforce in response to economic pressures."); Smith v. General Scanning, Inc., 876 F.2d 1315, 1321-22 (7th Cir. 1989) (a court must not second-guess a reorganization

[5] Indeed, the employer need not even prove it was actually motivated by the proffered reasons. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (solely a production burden). Moreover, even if one proffered reason is false, that does not mandate a finding that the other reasons were false. Roebuck v. Drexel Univ., 852 F.2d 715, 734 (3rd Cir. 1988).

decision). Indeed, "courts are less competent than employers to restructure business practices, and unless mandated by Congress, they should not attempt it." Id. To show pretext, a plaintiff must show that the defendant "did not honestly believe the reasons it gave for [the plaintiff's] termination." Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1013 (7th Cir. 2000). However, a restructuring of business practices is not a free pass for discrimination: "even within the context of a legitimate reduction-in-force, an employer may not fire an employee because of his age." Yates, 267 F.3d at 800 (citing Carlton v. Mystic Transp., Inc., 202 F.3d 129, 136 (2d Cir. 2000), cert. denied, 530 U.S. 1261, 120 S. Ct. 2718).

Once the defendant provides a legitimate, non-discriminatory reason for the termination, the question of liability essentially becomes a factual one. Any presumption of discrimination drops out of the analysis, Burdine, 450 U.S. at 255 n.10, 101 S. Ct. at 1095 n.10, and the plaintiff must persuade the trier of fact that age "actually motivated the employer's decision." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706 (1993). Minor differences in the legal approaches taken by the Circuit Courts of Appeals may therefore be less salient, as compared to factual differences in cases.

Some circuit variations in the non-discriminatory reason/pretext analysis may be relevant, however. For instance, the Second Circuit, which does not have a special prima facie case for the RIF context, seems to treat a RIF as a potential non-discriminatory reason for the discharge. See Tarshis, 211 F.3d at 36-38. The court recognizes "that a reduction in force or restructuring that results in an elimination of jobs often is a legitimate reason for dismissing an employee." Id. at 37. If a RIF is treated as a legitimate non-discriminatory reason as a matter of law, the defendant will nearly always meet its production burden. However, "such a reduction is not always the whole story." Id. Therefore when the facts do not support a suggestion that the RIF was the real reason for the discharge, a plaintiff may prevail at the pretext stage. "Although … the ADEA [does] not grant courts authority to second-guess the wisdom of corporate business decisions [they] must nevertheless judge whether the proffered explanation in light of all the circumstances is a rational one." Id.

The Fifth Circuit, which does have a special prima facie case for the RIF context, has made statements similar to the Second Circuit's. See Armendariz, 58 F.3d at 150 ("Job elimination or office consolidation is a sufficient nondiscriminatory reason for discharge under the ADEA."). However, the statement was accompanied by economic figures showing the necessity of the reduction in force. See id. at 150-51 (discussing evidence that cost reductions were necessary). The Ninth Circuit has also used this type of language, when an employer showed that the RIF was performed based on performance rankings. See Coleman, 232 F.3d at 1282 ("A RIF is a legitimate nondiscriminatory reason for laying off an employee.").

The Eighth Circuit has made statements suggesting that the employer's burden is to show that the RIF, rather than the individual plaintiff's termination, was performed for a legitimate, non-discriminatory reason. See Taylor, 218 F.3d at 900 ("The [employer] articulated a legitimate, nondiscriminatory reason (severe financial losses) for the reduction-

in-force."). However, this statement was followed by a pretext analysis in which the reasons for including the particular employee in the RIF were challenged as pretextual. Id. This may suggest that the court's reference to a legitimate non-discriminatory reason for the RIF, rather than the individual plaintiff's termination, was of no consequence.

II. Proof and Defense of Disparate Impact Claims

RIFs are also challenged on the ground that the decisions had a disparate impact on, or disproportionately affected, employees in certain protected categories. In contrast to a disparate treatment claim, the disparate impact theory ignores the employer's intent or motive. Instead, an employee establishes disparate impact discrimination by demonstrating that a facially neutral policy has a discriminatory effect on members of protected class workers. See 42 U.S.C. § 2000e-2(k).

A. General Principles

Under Title VII, the plaintiff in a disparate impact case must demonstrate that the employer used a particular employment practice that caused a disparate impact on the basis of race, religion, sex, or other protected characteristic. Id.; see also Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 95 S. Ct. 2362, 2375 (1975). A disparate impact showing requires that the plaintiff (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two. Robinson v. Metro-North Commuter Railroad Co., 267 F.3d 147, 160 (2nd Cir. 2001), cert. denied, 122 S. Ct. 1349 (2002). A RIF, or the process of choosing who is affected by the RIF, qualifies as an employment practice for these purposes. See, e.g., EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999).

Statistical proof is usually central to plaintiff's claims in disparate impact claims. The statistics must reveal that the "disparity is 'substantial' or 'significant.'" Bouman v. Block, 940 F.2d 1211, 1225 (9th Cir. 1991) (quoting Clady v. County of Los Angeles, 770 F.2d 1421, 1428 (9th Cir. 1985)); see also EEOC v. Joint Apprenticeship Comm., 186 F.3d 110, 117 (2d Cir. 1999) (disparate impact must be "significant" and disparity must be "substantial"). However, a mere showing of differential effect is not enough; the statistics must be "of a kind and degree sufficient to show" a causal connection between the challenged practice and the disparity. Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 994, 108 S. Ct. 2777, 2789 (1988). The federal agency guidelines for the establishment of statistical proof require a showing that the protected group is selected at less than four-fifths or 80 percent of the rate achieved by the highest scoring group. 28 C.F.R. § 50.14 at § 4(d) (2002). These guidelines have not been promulgated as regulations and therefore do not have the force of law; however, the fourth fifths rule is the guideline used by the Equal Employment Opportunity Commission when reviewing disparate impact allegations.

If the plaintiff is able to demonstrate a sufficiently significant disparity, the burden of proof shifts to the employer to demonstrate that the challenged practice is job-related and consistent with business necessity. 42 U.S.C. § 2000e-2(k); see also Albemarle Paper Co.,

422 U.S. at 425, 95 S. Ct. at 2375. Alternately, the employer may attempt to disprove the plaintiff's proof of disparate impact, by showing either that no disparity in fact exists, or that the challenged practice was not the cause of the disparity. See Robinson, 267 F.3d at 161. If the employer can convince the trier of fact that the employment practice did not cause a disparate impact, the case ends and the defendant prevails.

If the employer can prove job-relatedness and business necessity, however, the plaintiff may still prevail by proving that an alternative employment practice causing less impact on the protected group would serve the employer's legitimate needs, and that the employer refuses to adopt the alternative practice. 42 U.S.C. § 2000e-2(k); Albemarle Paper Co., 422 U.S. at 425, 95 S. Ct. at 2375.

B. Application to Age Discrimination Claims in RIFs

As noted earlier, a RIF may be an employment practice that creates a disparate impact on a protected group. The status of disparate impact claims for age discrimination—the most likely type of claim in connection with a RIF—is, however, in dispute. The Supreme Court has expressly refused to rule on the availability of disparate impact claims under the ADEA. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706 (1993) ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here.") (citation omitted). However, several of the Justices have suggested that a disparate impact theory should not be available. See id. at 618, 113 S. Ct. at 1710 (Kennedy, J., joined by Rehnquist, C.J., and Thomas, J., concurring); Markham v. Geller, 451 U.S. 945, 101 S. Ct. 2028 (1981) (Rehnquist, J., dissenting from denial of certiorari). Moreover, the majority in Hazen Paper based its decision on arguments consistent with a finding that disparate impact is not available. E.g., Hazen Paper Co., 507 U.S. at 610, 113 S. Ct. at 1706 ("Disparate treatment … captures the essence of what Congress sought to prohibit in the ADEA.").

The Courts of Appeals are split on this issue. While the Fourth, Fifth, and District of Columbia Circuits do not appear to have directly addressed the issue, the First, Third, Sixth, Seventh, Tenth, and Eleventh Circuits have either held or suggested that a disparate impact theory is not available under the ADEA. See Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999); DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 732-35 (3rd Cir. 1995) (opinion of Greenberg, J.) (strongly suggesting that disparate impact is never available under ADEA, but holding only that it is not applicable to the case); Lyon v. Ohio Education Association, 53 F.3d 135, 140 n.5 (6th Cir. 1995) (dicta) (implying Hazen Paper might overrule prior Circuit precedent which suggested a disparate impact theory might be available); Blackwell v. Cole Taylor Bank, 152 F.3d 666, 672 (7th Cir. 1998) ("[D]isparate impact is not, at least in this circuit, a permissible theory of violation of the ADEA.") (citing EEOC v. Francis W. Parker School, 41 F.3d 1073, 1077 (7th Cir. 1994)); Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996) ("[D]isparate impact claims are not cognizable under the ADEA."); Adams v. Florida Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001) ("[D]isparate impact claims

may not be brought under the ADEA."), cert. granted, 122 S. Ct. 643, and cert. dismissed, 122 S. Ct. 1290 (April 1, 2002).[6]

The Second, Eighth, and Ninth Circuits, however, have held that the disparate impact theory is available under the ADEA. See Smith v. Xerox Corp., 196 F.3d 358, 367 & n.5 (2nd Cir. 1999) (stating that "[t]his Court generally assesses claims brought under the ADEA identically to those brought pursuant to Title VII, including disparate impact claims" while noting that other courts had questioned the presence of ADEA disparate impact claims in light of Hazen Paper); District Council 37, AFSCME v. New York City Dep't of Parks & Recreation, 113 F.3d 347, 351 (2nd Cir. 1997) (following a pre-Hazen Paper case holding that disparate impact is available while citing, but not discussing, Hazen Paper); EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 950 (8th Cir. 1999) ("[T]he law of this circuit is that disparate-impact claims are cognizable under the ADEA."); Katz v. Regents of the Univ. of California, 229 F.3d 831, 835 (9th Cir. 2000) (similar), cert. denied, 532 U.S. 1033, 121 S. Ct. 1989 (2001).

Many of those circuits that recognize disparate impact claims under the ADEA have, however, limited those claims to those that show that the entire class of over-40 persons was adversely affected by the RIF. In other words, a plaintiff cannot show that, for instance, the group of employees consisting of only those who are his age or older were adversely impacted by the RIF. See Criley v. Delta Air Lines, Inc., 119 F.3d 102, 105 (2nd Cir. 1997) (Disparate impact claim "must allege a disparate impact on the entire protected group, i.e., workers aged 40 and over."); EEOC v. McDonnell Douglas, 191 F.3d at 950-51 (directly rejecting disparate impact claim for a subgroup of the protected group). The Ninth Circuit, while recognizing the issue, has not yet decided it. See Katz, 229 F.3d at 835-36 (deciding case on other grounds).

[6] During its last term the Supreme Court was expected to finally resolve the circuit split on the question of whether a disparate impact claim could be brought under the ADEA. Instead, however, the Court dismissed the Florida Power case after oral argument, stating only that review had been "improvidently granted."

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"Layoffs, Downsizing, And RIFs: How To Do Them Right"

Drafting Enforceable Separation Agreements

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Exhibit 1: Sample RIF Separation Agreement for Employees Age 40 or Older

Exhibit 2: Sample RIF Separation Agreement for Employees Under Age 40

I. INTRODUCTION

It is increasingly rare to find employers implementing a RIF without asking the terminated employees to sign a separation agreement containing a full release of claims. These releases are given in exchange for benefits that the employee would not otherwise receive – typically a lump sum severance payment.

With current economic conditions, it is likely that the number of RIFs, and accordingly lawsuits, will continue to rise. Separation agreements are a good way for employers to limit potential liability from employee lawsuits.

There are potential drawbacks to providing a release of claims to terminated employees. Most obvious is the fact that the company will have to pay the terminated employee money it would not otherwise be obligated to pay. In addition, an employee who has not previously considered his legal options may be alerted by the agreement's contents that he has potential claims to raise against the company.

The advantages to providing a separation agreement, however, are great. First and foremost, employees who sign a release of claims waive the right to bring any litigation against the company. Second, the employer may be able to include in the agreement certain restrictions on the employee's future conduct, such as a non-disparagement clause or a provision requiring the employee to cooperate with the company in the event of future litigation. Third, the company will know who refused to sign the agreement, and in turn be put on notice of individuals who may bring future claims.

II. SEPARATION AGREEMENT TERMS

A. Required or Strongly Recommended Terms

Inclusion of the following terms ensures that any waiver of claims is voluntary and knowing (the linchpin of a valid agreement), and that the employer will be provided maximum protection against potential employee claims:

1. A clear statement of the last date of employment, last date on active payroll, and the last date of benefits eligibility. These three are often the same.

2. Employee acknowledgment that she has received all monies due: wages, bonuses, vacation pay, and any and all other benefits and compensation earned through her last day of employment.

3. The amount of severance pay, the manner in which it will be paid (i.e., over time or in a lump sum), and the time of the payment(s).

4. Employee acknowledgment that he has received consideration to which he is not otherwise entitled.

5. A general release by the employee of all claims, both known and unknown, that she currently has or might have against the employer.

    a. In California, the release should include a waiver of all "claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." Cal. Civil Code § 1542.

6. Acknowledgement that the agreement is a compromise and full settlement of all disputes between the employee and employer, and a statement by the employer denying the validity of the employee's disputed claims (if any) and stating that nothing in the agreement should be construed as an admission of liability.

7. If the employee has already filed a claim or lawsuit against the company, an agreement that the claim or lawsuit will be dismissed.

8. An acknowledgement by the employee that he fully understands the agreement; he has had adequate time to review it; and he has signed it knowingly and voluntarily without relying on any representations by any company representative concerning the meaning of the agreement.

9. The employee's signature and date of signature.

10. A release that includes discrimination claims under the Age Discrimination in Employment Act ("ADEA") must include the following:

    a. an acknowledgment by the employee that she has had 45 days to review the agreement (or 21 days, in non-RIF situations where the employee is the only person being terminated); that she will have 7 days to revoke her signature if she so chooses; that she has been advised to consult with a lawyer; and that the release includes a waiver of claims under ADEA; and

    b. a chart listing all employees who were considered for the RIF, by department, job title, and age, and showing who was selected and who was not selected for the RIF.

    For more on ADEA waiver requirements, see infra section IV.

B. Optional Terms

Exclusion of the following terms will not invalidate a separation agreement. However, sometimes it is advisable to include them – e.g., to avoid future confusion on certain issues, or because the employee insists on their inclusion and the employer determines that on balance obtaining a signed release from the employee merits their inclusion.

1. Agreement by the employee not to apply for reemployment and waiver of any rights to be recalled to employment.

2. If any portion of the severance is being paid in settlement of a claim for non-wage damages (e.g., a claim for emotional distress damages or attorney's fees), an allocation of the severance pay between the portion from which taxes will be withheld (and for which a W-2 will be issued) and the portion from which taxes will not be withheld (and for which a 1099 will be issued), as well as any non-taxable portion. Also, if appropriate, a statement that the employee indemnifies the employer against any liability arising from the allocation.

3. If the severance pay is to be paid over time, an explanation of what will happen in the event of the employee's death prior to full payment.

4. Provisions clarifying other benefits issues, such as the number of vested stock options the employee has, the deadline for executing those options, and the strike price.

5. A statement by the employee acknowledging that he has returned all company property.

6. An acknowledgement by the employee that she was employed at will.

7. A non-solicitation and/or non-compete provision.

8. A statement that the employee has an ongoing duty to maintain the employer's confidential information and trade secrets.

9. A provision requiring the employee to keep the terms and amount of the separation agreement confidential.

10. A provision prohibiting the employee from making disparaging comments about the employer.

11. Mutuality of certain provisions (such as the release of claims, the confidentiality clause, and/or the non-disparagement clause).

12. Information on outplacement counseling, if offered to the employee.

13. An acknowledgement by the employer that it will not contest the employee's claim for unemployment benefits.

14. A statement that the employer will purge objectionable materials from the employee's personnel file.

15. An agreement by the employer to provide a letter of recommendation or references (with the form of reference letter attached as an exhibit, if appropriate).

16. A provision requiring the employee to cooperate with legal proceedings (including investigations and regulatory matters) in which the employee has pertinent information.

17. A provision prohibiting the employee from encouraging or cooperating in the prosecution of other persons' actions against the company, unless legally required to do so, and requiring the employee to notify the company before such encouragement or cooperation will take place.

18. A clause requiring the employee to arbitrate any disputes arising out of the agreement.

19. A statement that the employee will be responsible for her own attorneys' fees and costs if a dispute arises over the agreement.

20. Signature by the employee's attorney, if any.

21. A statement that any ambiguity in the agreement will not be construed presumptively against any party.

22. Customary contractual requisites (e.g., notice provisions, integration clause, severability, governing law, execution in counterparts).

III. WAIVER OF CLAIMS

A. *Claims That May Be Waived*

1. Most federal law claims are waivable. See, e.g., United States v. Allegheny-Ludlum Indus., 517 F.2d 826 (5th Cir. 1975) (Title VII), cert. denied, 425 U.S. 944 (1976); Stroman v. W. Coast Grocery Co., 884 F.2d 458 (9th Cir. 1989) (same), cert. denied, 498 U.S. 854 (1990); Finz v. Schlesinger, 957 F.2d 78 (2d Cir.) (ERISA), cert. denied, 506 U.S. 822 (1992); Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 181 (1st Cir. 1995) (same); O'Shea v. Commercial Credit Corp., 930 F.2d 358 (4th Cir.) (ADEA), cert. denied, 502 U.S. 859 (1991); O'Hare v. Global Natural Res., Inc., 898 F.2d 1015 (5th Cir.1990) (same); Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9 (1st Cir. 1997) (ADA); Johnson v. Motorola, Inc., 2001 WL 1105095 (N.D. Ill. Sept. 20, 2001) (same); see also 42 U.S.C. § 2000e-5(b) (promoting conciliation of employment disputes).

2. Although an employee may individually waive his Title VII rights, a union may not waive them through collective bargaining. See, e.g., EEOC v. Bd. of Governors of State Colleges & Univs., 957 F.2d 424 (7th Cir.), cert. denied, 506 U.S. 906 (1992).

3. Unlike claims brought under Title VII, ERISA, and the ADA, age discrimination claims under ADEA are subject to specific statutory and regulatory waiver requirements. These requirements are discussed in section IV, infra.

4. Most state law claims are waivable, unless a state statute expressly prohibits the waiver of claims that arise under the statute. See infra section III(B)(4).

B. *Claims That May Not Be Waived*

1. FLSA Claims

Claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq., may not be waived without Department of Labor involvement. D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945); Walton v. United Consumer Club Inc., 786 F.2d 303, 306 (7th Cir. 1986) ("Courts . . . have refused to enforce wholly private settlements" of FLSA claims). However, *bona fide* disputes over hours may be compromised. Strand v. Garden Valley Tel. Co., 51 F. Supp. 898 (D. Minn. 1943).

2. ERISA Claims

Under ERISA, an employer cannot require that a terminated employee sign a release of claims as a condition to payment of a vested severance benefit. However, if the condition is present at the implementation of the program, or contained in a properly promulgated amendment, the employer may make payment of severance conditional on the execution of a release. Harlan v. Sohio Petroleum Co., 677 F. Supp. 1021 (N.D. Cal. 1988); Lockheed Corp. v. Spink, 517 U.S. 882 (1996) (employer may require release of all employment-related claims in exchange for enhanced retirement or severance benefits without violating ERISA).

3. Claims Brought Before the EEOC

At least one court has held that the right to file a charge of discrimination with the EEOC is not waivable, even if the right to personal relief under anti-discrimination statutes is waivable. EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085 (5th Cir. 1987). Furthermore, the EEOC retains jurisdiction to investigate or prosecute perceived violations even when the employee does not want to proceed against the employer. Thus, even if the employee settles with his employer, the EEOC may still proceed to obtain injunctive relief against the employer. EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539 (9th Cir. 1987).

a. The EEOC also is not barred from pursuing claims in court on behalf of an employee who has entered into an arbitration agreement with his employer. EEOC v. Waffle House, Inc., 122 S. Ct. 754 (2002).

4. State Law Claims May Not Be Waivable

a. Whether state law claims are waivable is a matter of state discretion. For example, under New York law, an individual may not waive her right to receive workers' compensation benefits (Workers' Compensation Law, Art. 2 § 32) or unemployment benefits (Labor Law Art. 18 § 595(1)). The same is true in Massachusetts. See Mass. Gen. Laws ch. 152, § 46 (individual may not waive right to receive worker's compensation benefits); Mass. Gen. Laws ch. 151A, § 35 (same, for unemployment benefits).

b. Another area of state-specific law concerns the effect of severance pay on the employee's eligibility for unemployment benefits. In New York, a person is entitled to unemployment benefits during the period covered by his severance pay – unless the severance is actually a "back pay" award. See Labor Law § 517(h); In Re Claim of Baxter, 159 A.D.2d 845, 852 N.Y.S. 2d 711 (3d Dep't 1990); In re Claim of Hernandez, 97 A.D.2d 585, 468 N.Y.S.2d 63 (3d Dep't. 1983), aff'd, 63 N.Y.2d 737, 480 N.Y.S.2d 207 (1984). Similarly, in Massachusetts a person who receives severance pay is eligible for unemployment benefits for the period covered by the severance, if, as is usually the case, she had

to sign a release of claims in exchange for the severance. White v. Comm'r of Dep't of Employment & Training, 40 Mass. App. Ct. 249 (1996).

c. Under California law, unless an employee specifically waives the protection of California Civil Code § 1542, a general release will not waive "claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." Therefore, releases for employees protected by California law should include this statutory language verbatim.

d. Finally, in all states, employees are entitled to wages earned. Thus, an employee cannot waive receipt of wages or other benefits that are already due.

C. *Test for a Knowing and Voluntary Waiver*

A court will uphold an agreement containing a waiver of claims if it is signed knowingly and voluntarily. See, e.g., Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9 (1st Cir. 1997). Relevant factors in making this determination include the following:

1. the employee's education and business sophistication;

2. the roles of the parties in determining the terms of the waiver;

3. the waiver's clarity;

4. the time given to the employee to review the terms;

5. whether the employee had legal or other independent advice; and

6. the consideration given in exchange for the waiver.

IV. REQUIREMENTS FOR RELEASE OF A FEDERAL AGE DISCRIMINATION CLAIM

A. *Requirements for a Valid ADEA Waiver*

In 1990, Congress enacted the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 621 et seq., as an amendment to the Age Discrimination in Employment Act ("ADEA"). OWBPA, and EEOC regulations interpreting OWBPA, set forth certain requirements for a valid waiver of a federal age discrimination claim. The employer bears the burden of proving that these requirements are met. 29 U.S.C. § 626(3).

Under 29 U.S.C. § 626(f)(1) and 29 C.F.R. § 1625.22, the following must be present for a valid waiver of ADEA claims:

1. The waiver must be written in plain language so that the agreement is understandable by the average person.

2. The waiver must inform the employee that she is waiving any rights she may have to sue for age discrimination under ADEA.

3. The waiver cannot apply to claims that arise after the date the release is signed. However, the agreement can require the employee to perform future employment-related actions, such as retiring or resigning at some later date.

4. The waiver must be given in exchange for consideration beyond that to which the employee is already entitled.

5. The agreement must state in writing that the employee is advised to consult an attorney before signing the waiver.

6. When two or more employees are being terminated (whether or not characterized as an "exit incentive program"), the employees must be given at least 45 days to review the agreement. Unless the parties agree otherwise, material changes to the agreement re-start the clock. An employee is permitted to sign in less than 45 days, if that decision is knowing and voluntary.

    a. To obtain a valid waiver in settlement of an EEOC charge or court complaint, the employee must be given only a "reasonable period of time" to review the waiver.

    b. If only one employee is being terminated, the 45-day requirement is reduced to 21 days.

7. When two or more employees are being terminated (whether or not characterized as an "exit incentive program") and the employees are being offered severance in exchange for signing a release, they must be informed of the following in writing:

   a. the groups of employees eligible to receive severance;

   b. any eligibility requirements (such as signing a release);

   c. any time limitations; and

   d. the job titles and ages of all the selected employees and all the non-selected employees in the "decisional unit" – that is, the part of the organization from which the employer chose the persons who would be offered severance (e.g., the Sales department).

8. The employee must be given at least 7 days to revoke her signature. The agreement should state that it is not enforceable until the revocation period ends.

B. *An Employee Cannot Waive His Right to File an ADEA Claim with the EEOC.*

Under OWBPA, the right to file an ADEA claim with the EEOC, and the right to participate in an EEOC investigation or proceeding, are not waivable. 29 U.S.C. § 626 (f)(4); 29 C.F.R. § 1625.22(i). Therefore, even if an employee signs a waiver that complies with OWBPA, she may still report a complaint of age discrimination to the EEOC or cooperate with the EEOC in an investigation. EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529 (2d Cir. 1996).

C. *Do OWBPA Requirements Apply to Waivers of Other Claims?*

Generally courts have rejected the argument that OWBPA requirements apply to waivers of other claims. See, e.g., Williams v. Phillips Petroleum Co., 23 F.3d 930 (5th Cir.) (rejecting employee's argument that OWBPA factors should apply to release of WARN Act claim), cert. denied, 513 U.S. 1019 (1994); Tung v. Texaco Inc., 150 F.3d 206 (2d Cir. 1998) (waiver of Title VII claim was valid even though OWBPA requirements were not met).

D. *Ratification and Tender Back Under OWBPA*

In 1998, the Supreme Court held that if a waiver fails to comply with OWBPA, the employee need not return the severance pay he received in exchange for signing the waiver before challenging the waiver in court. In other words, if the employee keeps the severance, he will not be held to have ratified the invalid release. Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998).

EXHIBIT 1

Sample separation agreement for employees age 40 or older

SEPARATION AGREEMENT
AND GENERAL RELEASE OF CLAIMS

This Separation Agreement and General Release of Claims (the "Agreement") is being entered into between _____ (the "Company") and _____ ("Employee").

WHEREAS, the Company has instituted a corporate restructuring program that has resulted in Employee's termination as an employee of the Company; and

WHEREAS, the parties hereto desire to enter into a written agreement embodying their mutual understanding and promises concerning resolution of any and all issues concerning Employee's employment and the termination of thereof.

NOW, THEREFORE, in consideration of the mutual promises set forth below, and intending to be legally bound, the parties hereto agree as follows:

1. Termination Date. Employee's employment will end on _____, 2002 (the "Termination Date"). No later than _____, 2002, Employee will receive payment for all wages and accrued, unused vacation.

2. Severance Pay. In exchange for the promises contained herein, the Company will continue to pay Employee his/her final bi-weekly salary of $_____, less all applicable deductions and withholdings (the "Severance Pay"), until _____, 2002 (the "Severance Pay Period") **[or will pay in a lump sum]**. Employee acknowledges and agrees that the Severance Pay is not otherwise owed to Employee under any employment agreement (oral or written) or any Company policy or practice. The Severance Pay will be paid to Employee in accordance with the Company's regular payroll practices **[or in a lump sum]** beginning promptly after the effective date of this Agreement, which shall be 7 days following the date on which Employee signs and returns this Agreement.

3. Benefit Continuation

a. Employee may elect to continue his/her current group medical and/or dental insurance coverage for up to 18 months following the Termination Date, provided Employee or Employee's eligible dependent(s) remain eligible for such coverage under the federal law known as COBRA.

b. Except as provided herein, Employee's right to any and all Company benefits will terminate on the Termination Date.

4. Reference Information. If contacted by a prospective employer for reference information concerning Employee, the Company will confirm only Employee's dates of employment, last position held, and that Employee's position was eliminated as a result of a corporate restructuring program.

5. General Release of Claims.

a. Employee, on behalf of himself/herself and his/her spouse, heirs, agents, attorneys, representatives, and assigns, hereby releases and discharges forever all claims and causes of action that have arisen or might have arisen at any time up to and including the date on which Employee signs this Agreement (whether known or unknown, accrued, contingent, or liquidated) that Employee now has or may have against the Company and/or any or all of its present or past subsidiaries, parent corporations, divisions, affiliated entities, officers, directors, shareholders, partners, employees, representatives, agents, attorneys, predecessors, successors, and assigns (collectively, "Releasees"), including, without any limitation on the general nature of this release, any claims relating to Employee's employment with the Company and the termination thereof; any claims based on statute, regulation, ordinance, contract, or tort; any claims arising under the Age Discrimination in Employment Act or any other federal, state, or local law relating to employment discrimination, harassment, or retaliation; any claims relating to wages, compensation, or benefits; and any claims for attorney's fees.

b. By signing this Agreement, Employee acknowledges that he/she has not filed any complaints, charges, or claims for relief against any of the Releasees with any local, state, or federal court or administrative agency.

6. At-Will Employment. By signing this Agreement, Employee acknowledges that he/she has been, at all times, an "at will" employee of the Company.

7. Company Property. By signing this Agreement, Employee agrees and acknowledges that Employee has returned to the Company all originals and copies of Company documents and all Company property, including without limitation, computer files, diskettes, database information, client information, sales documents, financial statements, budgets and forecasts, computers, keys, and corporate credit cards.

8. Confidentiality of Agreement. Employee agrees to keep the terms and amount of this Agreement completely confidential, and not to disclose any such matters to anyone, in words or in substance, except as set forth in this section. Notwithstanding the foregoing, Employee may disclose the terms and amount of this Agreement (a) to Employee's immediate family, tax or other financial advisor, and/or lawyer, *provided that* Employee shall first obtain any such person's agreement to keep any such matters completely confidential and not to disclose any such matters to anyone; and (b) to the extent required by law or to the extent necessary to enforce Employee's rights under this Agreement. Nothing in this Agreement shall prohibit Employee from filing a claim with the federal Equal Employment Opportunity Commission ("EEOC") (although Employee acknowledges he/she will be barred from obtaining any monetary or other relief from the EEOC against any of the Releasees) or cooperating in an EEOC investigation or proceeding.

9. Non-Disparagement. Employee agrees not to make any statement, written or oral, which disparages the Company, its services or products, or any of its directors, officers, employees, or agents.

10. Information on Corporate Restructuring. In the Company's desire to be in compliance with the Older Workers Benefit Protection Act, the Company advises Employee of the following:

a. Because of economic reasons, the Company is terminating 8 employees from the following departments: Marketing (4), Consulting (3), Support & Training (1).

b. All of the employees being terminated will be eligible to receive severance pay in exchange for signing a release of claims.

c. Attached to this Agreement is a chart of all employees in all departments that were considered for the reduction in force, by department, job title, and age. The chart shows which employees are being terminated and which are not.

11. Binding Nature of Agreement. This Agreement shall be binding upon the parties, their heirs, administrators, representatives, executors, successors, and assigns.

12. Use of the Agreement as Evidence. This Agreement may not be used as evidence in any proceeding of any kind, except a proceeding (a) in which one of the parties alleges a breach of the terms of this Agreement, or (b) in which one of the parties elects to use this Agreement as a defense to any claim.

13. Liability. This Agreement shall not constitute an admission or acknowledgment of liability or wrongdoing on the part of the Company or any other person or entity released herein.

14. Consequences of Breach. Employee understands and agrees that the Company may terminate Employee's continued eligibility for Severance Pay and immediately recover all Severance Pay payments previously made to Employee if Employee violates this Agreement.

15. Entire Agreement. With the exception of **[insert title of confidentiality or non-competition agreement, if Employee signed one]**, which will remain in full force and effect, this Agreement is the entire agreement between the Company and Employee, and all previous agreements or promises between the Company and Employee are superseded and void. This Agreement may be modified only by a written agreement signed by Employee and an officer of the Company.

16. Acknowledgement and Other Terms.

a. Employee is advised to consult with an attorney before signing this Agreement.

b. Employee has 45 days from the day Employee receives this Agreement to review and sign it. If Employee chooses, Employee may sign this Agreement before the expiration of the 45-day period. In the event that Employee signs and returns this Agreement in

less than 45 days, Employee agrees and acknowledges that such decision was entirely voluntary and that Employee had the opportunity to consider this Agreement for the entire 45-day period.

c. Employee will have 7 days after signing this Agreement to revoke his/her decision by delivering a written notice of revocation to the Company. To be effective, such written notice of revocation must be received by _____ at the Company within the 7-day revocation period. The Company acknowledges that this Agreement shall not become valid or enforceable until the expiration of the 7-day revocation period.

d. By signing this Agreement, Employee acknowledges that he/she has carefully read and fully understands all its provisions, and that he/she is signing it voluntarily. Employee also acknowledges that he/she is not relying on any representations by any representative of the Company concerning the meaning of any aspect of this Agreement.

17. Governing Law. This Agreement will be governed by and construed as a whole, will be interpreted in accordance with its fair meaning, and will not be construed strictly for or against either Employee or the Company. This Agreement will be governed by and construed in accordance with the law of _____. If for any reason any part of this Agreement shall be determined to be unenforceable, the remaining terms and conditions shall be enforced to the fullest extent possible.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date last written below.

[COMPANY NAME]

_____
Employee

Date:_____

By:_____
Title:_____

Date:_____

DEPARTMENT	JOB TITLE	AGE	X= SELECTED FOR TERM.
Marketing	Marketing Assistant	23	X
	Marketing Manager	34	
	Web Developer	27	
	Product Marketing	41	X
	Partner Marketing	49	
	Public Relations	26	X
	VP Marketing	34	
	Director Web Development	52	X
Consulting	VP, Consulting	42	
	Sr. Consultant	36	
	Sr. Consultant	35	
	Sr. Consultant	33	
	Consultant	39	X
	Consultant	38	
	Consultant	37	
	Consultant	37	
	Consultant	33	X
	Consultant	33	
	Consulting Specialist	24	
	Principal Consultant	41	
	Dir. Strategic Initiatives	44	
	West Regional Manager	57	
	East Regional Manager	59	
	Pre-Sales	28	X
Support & Training	Sr. Technical Support Engineer	37	
	Sr. Technical Support Engineer	36	
	Jr. Technical Support Engineer	25	X
	Technical Support Engineer	38	
	Technical Support Engineer	28	
	Technical Support Engineer	25	
	Technical Support Engineer	23	
	Technical Support Engineer	23	
	Technical Support Engineer	22	
	Support Manager	34	
	Training Manager	34	

EXHIBIT 2

Sample separation agreement for employees under age 40

SEPARATION AGREEMENT
AND GENERAL RELEASE OF CLAIMS

This Separation Agreement and General Release of Claims (the "Agreement") is being entered into between _____ (the "Company") and _____ ("Employee").

WHEREAS, the Company has instituted a corporate restructuring program that has resulted in Employee's termination as an employee of the Company; and

WHEREAS, the parties hereto desire to enter into a written agreement embodying their mutual understanding and promises concerning resolution of any and all issues concerning Employee's employment and the termination of thereof.

NOW, THEREFORE, in consideration of the mutual promises set forth below, and intending to be legally bound, the parties hereto agree as follows:

1. Termination Date. Employee's employment will end on _____, 2002 (the "Termination Date"). No later than _____, 2002, Employee will receive payment for all wages and accrued, unused vacation.

2. Severance Pay. In exchange for the promises contained herein, the Company will continue to pay Employee his/her final bi-weekly salary of $_____, less all applicable deductions and withholdings (the "Severance Pay"), until _____, 2001 (the "Severance Pay Period") **[or will pay in a lump sum]**. Employee acknowledges and agrees that the Severance Pay is not otherwise owed to Employee under any employment agreement (oral or written) or any Company policy or practice. The Severance Pay will be paid to Employee in accordance with the Company's regular payroll practices **[or in a lump sum]** beginning promptly after Employee signs this Agreement.

3. Benefit Continuation

a. Employee may elect to continue his/her current group medical and/or dental insurance coverage for up to 18 months following the Termination Date, provided Employee or Employee's eligible dependent(s) remain eligible for such coverage under the federal law known as COBRA.

b. Except as provided herein, Employee's right to any and all Company benefits will terminate on the Termination Date.

4. Reference Information. If contacted by a prospective employer for reference information concerning Employee, the Company will confirm only Employee's dates of employment, last position held, and that Employee's position was eliminated as a result of a corporate restructuring program.

5. General Release of Claims.

a. Employee, on behalf of himself/herself and his/her spouse, heirs, agents, attorneys, representatives, and assigns, hereby releases and discharges forever all claims and causes of action that have arisen or might have arisen at any time up to and including the date on which Employee signs this Agreement (whether known or unknown, accrued, contingent, or liquidated) that Employee now has or may have against the Company and/or any or all of its present or past subsidiaries, parent corporations, divisions, affiliated entities, officers, directors, shareholders, partners, employees, representatives, agents, attorneys, predecessors, successors, and assigns (collectively, "Releasees"), including, without any limitation on the general nature of this release, any claims relating to Employee's employment with the Company and the termination thereof; any claims based on statute, regulation, ordinance, contract, or tort; any claims arising under any federal, state, or local law relating to employment discrimination, harassment, or retaliation; any claims relating to wages, compensation, or benefits; and any claims for attorney's fees.

b. By signing this Agreement, Employee acknowledges that he/she has not filed any complaints, charges, or claims for relief against any of the Releasees with any local, state, or federal court or administrative agency.

6. At-Will Employment. By signing this Agreement, Employee acknowledges that he/she has been, at all times, an "at will" employee of the Company.

7. Company Property. By signing this Agreement, Employee agrees and acknowledges that Employee has returned to the Company all originals and copies of Company documents and all Company property, including without limitation, computer files, diskettes, database information, client information, sales documents, financial statements, budgets and forecasts, computers, keys, and corporate credit cards.

8. Confidentiality of Agreement. Employee agrees to keep the terms and amount of this Agreement completely confidential, and not to disclose any such matters to anyone, in words or in substance, except as set forth in this section. Notwithstanding the foregoing, Employee may disclose the terms and amount of this Agreement (a) to Employee's immediate family, tax or other financial advisor, and/or lawyer, *provided that* Employee shall first obtain any such person's agreement to keep any such matters completely confidential and not to disclose any such matters to anyone; and (b) to the extent required by law or to the extent necessary to enforce Employee's rights under this Agreement.

9. Non-Disparagement. Employee agrees not to make any statement, written or oral, which disparages the Company, its services or products, or any of its directors, officers, employees, or agents.

10. Binding Nature of Agreement. This Agreement shall be binding upon the parties, their heirs, administrators, representatives, executors, successors, and assigns.

11. Use of the Agreement as Evidence. This Agreement may not be used as evidence in any proceeding of any kind, except a proceeding (a) in which one of the parties alleges a breach of the terms of this Agreement, or (b) in which one of the parties elects to use this Agreement as a defense to any claim.

12. Liability. This Agreement shall not constitute an admission or acknowledgment of liability or wrongdoing on the part of the Company or any other person or entity released herein.

13. Consequences of Breach. Employee understands and agrees that the Company may terminate Employee's continued eligibility for Severance Pay and immediately recover all Severance Pay payments previously made to Employee if Employee violates this Agreement.

14. Entire Agreement. With the exception of **[insert title of confidentiality or non-competition agreement, if Employee signed one]**, which will remain in full force and effect, this Agreement is the entire agreement between the Company and Employee, and all previous agreements or promises between the Company and Employee are superseded and void. This Agreement may be modified only by a written agreement signed by Employee and an officer of the Company.

15. Acknowledgement and Other Terms. By signing this Agreement, Employee acknowledges that he/she has had a reasonable period of time to review the Agreement, that he/she has carefully read and fully understands all its provisions, that he/she is signing it voluntarily, and that he/she is not relying on any promises or oral or written statements or representations other that those in this Agreement.

16. Governing Law. This Agreement will be governed by and construed as a whole, will be interpreted in accordance with its fair meaning, and will not be construed strictly for or against either Employee or the Company. This Agreement will be governed by and construed in accordance with the law of _____. If for any reason any part of this Agreement shall be determined to be unenforceable, the remaining terms and conditions shall be enforced to the fullest extent possible.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date last written below.

[COMPANY NAME]

_____
Employee

Date:_____

By:_____
Title:_____

Date:_____

Drafting Enforceable Separation Agreements
October 22, 2002

Christine J. Wichers
Choate, Hall & Stewart

Problem:

Frivolous litigation by RIF'd employee

Solution:

Release!

"[A] rule allowing litigants to settle all claims with a plain and simple statement that the release covers any and all claims reduces transaction costs, puts sophisticated and unsophisticated litigants alike on equal footing, and adds certainty to settlement negotiations and agreements."

Chaplin v. NationsCredit Corp., __ F.3d __, 2002 WL 31107229 (5th Cir. Oct. 8, 2002)

Knowing & Voluntary Waiver

- Plain English
- Supported by consideration employee not already entitled to
- Employee has enough time to review
- ADEA requirements if employee is 40+

ADEA Waivers
(2 or more employees being terminated)

- 45 days to review
- 7 days to revoke signature
- Advised to consult with an attorney
- ADEA mentioned
- Chart with job titles & ages of all employees in the decisional unit, showing who was selected for the RIF & who is eligible for severance in exchange for signing a release

Layoffs, Downsizing & RIFs: How To Do Them Right

Kathlyn Noecker
Faegre & Benson LLP

Risk of Discrimination Claims

- Disparate Treatment
- Disparate Impact

Planning and Implementing a RIF: Key Considerations

- Adequate time for preparation
- Careful communications
- Thorough documentation of decision-making process and reasons
- Oversight by legal counsel

Identify Objectives

- Identify specific business reasons for RIF
- Compile documentation supporting business reasons
- Determine changes consistent with identified objectives
- Focus on organizational structure, not people

Review Existing Relationships and Restraints

- Employee handbooks
- Severance policies or plans
- Employment agreements, offer letters
- Collective bargaining agreements

Voluntary Incentive Programs

- Voluntary resignation program (not age-based)
- Voluntary early retirement program
  - Drawback - can't control who leaves

RIF: Identify Selection Criteria

- Consider objectives an optimal organizational structure
- Objective vs. subjective

Examples of Selection Criteria

- Seniority
- Elimination of job functions/positions
- Random
- Geographic location
- Production standards
- Attendance
- Performance reviews

Applying Selection Criteria

- Company-wide vs. department-wide
- Train managers in application or ranking
- Provide significant oversight to identify risk areas

Oversight By Legal

- Obtain initial projections
- Review for consistency with stated objectives for RIF and identified selection criteria
- Identify disparate impact and disparate treatment risks
- Adjust lists as appropriate to reduce risks, ensure consistency with stated rationale

