

Planning for and Executing A Reduction in Force

Because job losses are an inevitable part of any economic downturn, it is important to plan ahead should your company need to reduce its work force. As the old saying goes – an ounce of prevention avoids a ton of litigation.

1

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With an uncertain economy, many companies are faced with the dilemma of whether to implement a layoff or a reduction in force (RIF). For example, in May 2008, 1,552 employers implemented mass layoffs involving 50 or more employees, resulting in a total of 159,471 employees being laid off, according to the Bureau of Labor Statistics. The number of mass layoffs was up sharply from the prior month.

Some employers must make percentage reductions to their current work force to meet the needs of their businesses and shareholders. Accordingly, a RIF may involve a mass layoff, laying off a few people or even closing a department.

Once a RIF is under way, many employers have difficulty executing it in compliance with both company policy and the law. Therefore, it is important to review all potential legal issues that could result from such a RIF. Most important, specific, objective and nondiscriminatory criteria should be the basis for determining which individuals are to be laid off. Finally, employers should focus on maintaining an open and honest relationship with those who remain employed, disclosing all relevant information about the RIF program and frequently communicating with all employees to prevent an employee scare.

Sample policies beginning on page 10, should help meet the legal requirements and make a layoff more palatable to the laid-off employees and those remaining at the company.

Legal Overview

Employers should consider three federal laws, in addition to individual state statutes, before conducting a RIF in order to minimize legal risks:

- The Age Discrimination in Employment Act of 1967 (ADEA);
- The Older Workers Benefit Protection Act (OWBPA); and
- The Worker Adjustment and Retraining Notification Act of 1988 (WARN Act).

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These three laws may all play a pivotal role during the execution of a RIF. To understand fully how to use a RIF without risking company liability, it is necessary to examine each law.

ADEA

The ADEA prohibits age-based discrimination against employees. It states in pertinent part that:

(a) It shall be unlawful for an employer –

(1) to fail or refuse to hire *or to discharge any individual* or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(f) It shall *not* be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c) or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age ...

If age is a factor that is reasonably necessary to ensure success and productivity in a certain line of work, then the ADEA may not be an issue. In addition, if the layoff is based on factors other than age that are considered “reasonable,” the ADEA also may not arise. It would be important for an employer to seek legal advice if it sees that the group selected for layoff has more employees over 40 than under 40, because the ADEA generally protects employees age 40 and older from age-based discrimination.

OWBPA

The OWBPA serves as an amendment to the ADEA because it further clarifies the protections given to older individuals. The OWBPA imposes a series of very specific steps that must be taken when a layoff affects two or more employees and the employer asks them to release claims for age discrimination under federal law. Since many employees who are “rified” are age 40 and older, these requirements are often relevant.

In these situations, employees must receive up to 45 days to consider the agreement. In addition, the employer must provide each employee who is asked to sign a release with the name, job title, age and other information about co-workers who are and were not selected for the RIF within the particular decisional unit. The employer that does not strictly comply with the OWBPA's requirements risks paying severance only to learn that the signed agreement does not bar the age claims.

For more particulars on what must go into a release, see the box on page 9.

WARN Act

Once employers are confident that a RIF does not include discrimination against a protected class, they must examine notice requirements. The WARN Act requires that covered employers give a 60-day advance written notice to affected employees and certain governmental bodies before implementing a mass layoff. Covered employers consist of companies that employ 100 or more employees, excluding part-time employees, or

companies that employ 100 or more employees who in the aggregate work at least 4,000 hours per week, exclusive of overtime hours.

'Mass Layoff' Defined

A "mass layoff" is defined as a layoff of any of the following in a 30-day period:

- at least 500 employees;
- at least 50 employees and 33 percent of the employees at a single site;
- at least 50 employees in the case of a shutdown of a single site or operating units within a site; and
- separate, but related layoffs that occur within a 90-day period that in the aggregate exceed the three criteria.

Failure to comply with this law can result in liability for back pay, benefits, civil damages and the payment of attorney's fees. But careful planning and using specific and detailed releases are keys to preventing that outcome (see boxes).

Planning Is the Key

As with most situations, planning is key. Without a good plan it is easy to make decisions that may make sense initially, but will not withstand later claims. A good plan is to take the time to outline a process to review potentially affected employees before making any selection decisions. REVIEW, REVIEW and REVIEW your lists and criteria before making your final decisions.

Ensure You Have an Enforceable Release

Plaintiffs' lawyers are becoming increasingly familiar with what employers must do to obtain enforceable releases in RIFs. In addition, federal courts are now interpreting the ADEA to require employers to take more specific and detailed action than ever when seeking agreements releasing age discrimination claims. Employers that use warmed-over releases are likely to run into trouble!

Suggestions for Executing a Successful Reduction in Force

Here are some suggestions for making a RIF stay within legal requirements.

- **Ascertain the legitimate business needs and the precise reduction necessary to meet those needs.** Think hard before implementing a RIF. It could be possible to achieve business needs without terminating a large number of employees, and alternatives such as reducing wages or eliminating overtime should be considered.
- **Create a detailed reduction plan and establish objective criteria for selecting employees to layoff.** If a RIF is absolutely necessary, employers should consider eliminating specific job categories instead of specific individual employees. The elimination of categories rather than people reduces the chance that employees will feel individually targeted. Additionally, companies should create a list of factors that must be analyzed when selecting employees to layoff so the decision is impersonal and objective.
- **Plan ahead.** All too often, employers try to implement a RIF without spending enough time analyzing its potential risks and ramifications. A last-minute RIF can prevent human resources (HR) or the company legal counsel from communicating with employees and creating a strategy for execution.

- **Confirm that the list of factors relied upon for layoff selection is not discriminatory.** Factors like age or gender are discriminatory and cannot be relied on when selecting employees to layoff. Criteria such as seniority, productivity and flexibility are legitimate factors that the law allows in making layoff decisions. Regardless of the criteria used during selection, employers should ensure that it is specific, neutral, easily calculated and cannot be construed as discriminatory in any context. Vague or subjective criteria put employers at risk. If the criteria affect primarily older workers, employers should be prepared to demonstrate the factors used in the selection process.
- **Exclude from the selection process managers who have difficulty making unbiased or impersonal layoff decisions.** A RIF is not a personal attack on any affected employees. A reduction is done to meet business needs, and the selection process cannot be taken personally or involve biased opinions. Supervisors or managers in a company who cannot make unbiased decisions or decisions based solely on objective criteria should not be included.
- **Review all individual employment contracts, existing company policies and collective bargaining agreements before implementing a RIF.** Employers should double-check all company agreements, policies and contracts to ensure compliance with all previously established requirements.
- **Offer an early retirement option before executing a RIF.** If employees accept early retirement options, the employer will have fewer employees to lay off and less risk of legal liability.
- **When notifying the affected employees, make sure to prepare.** The person notifying the affected employees should conduct the meetings in a private area at the end of the workweek, and the meetings with each affected individual should be separate. A neutral third party can be present simply to witness the event, but the bearer of the bad news should be thoroughly prepared. He or she should be coached ahead of time, provided with specific information such as a prepared script and should try to be brief with the affected employee.
- **Be honest and communicate frequently with both affected employees and those remaining at the company.** The OWBPA and the WARN Act both require a certain amount of disclosure, but any additional information that can be provided to affected employees and those remaining at the company can help alleviate confusion and chaos. If all employees are made aware of the process, all criteria examined and any steps taken during execution, it is less likely that rumors will circulate and scare employees.
- **Provide affected employees with advance notice and detailed information about the layoff as the statute requires.** Companies must obey the law and provide affected employees with the information to which they are entitled legally. Companies should examine the ADEA, the OWBPA and the WARN Act before implementing a RIF, and must follow applicable statutory requirements.
- **Offer affected employees a severance package.** Severance packages can send the message to both the terminated employees and those remaining at the company that the company cares about its employees. These packages are not a legal requirement, but are recommended because they help the company maintain a good reputation. If a severance package is provided, employers should require that each

terminated employee accepting a package sign a binding release of all possible employment claims. This helps to prevent future lawsuits.

- **Assist terminated employees in finding employment elsewhere.** Companies will reduce the risk of being sued over a RIF if they help terminated employees find employment elsewhere. Providing job-search assistance also will help rebuild or maintain a good relationship with those who have been laid off, and provide reassurance to those remaining at the company.

OWBPA Release Requirements

- 1) You must give employees up to 45 days to consider whether to sign. (Releases of individual age claims require only a 21-day consideration period.) They can voluntarily decide to sign in less time.
- 2) The release must specifically state that employees are waiving ADEA claims. A broad release of “all claims” is not enough. You can’t ask employees to waive future rights.
- 3) You can’t force employees to give up the right to file a charge with the Equal Employment Opportunity Commission. Releases that require employees to give up “any and all claims” are therefore subject to challenge unless they provide an exception for employees to file agency charges. (But you can require that employees release their money claims, even if they cannot be prevented from filing charges.) You should specify this issue in your release language.
- 4) You can’t force employees to give up the right to file a lawsuit challenging the validity of the release itself. Again, specify this issue.
- 5) You must tell employees in writing to consult with an attorney in deciding whether to sign or reject the agreement. Merely telling employees that they have a “right” to consult an attorney is not sufficient.
- 6) In most situations, after employees have signed a release, you must give them an additional seven days to decide whether or not to revoke the agreement. You cannot shorten that time.
- 7) When you give employees the release agreement to consider, you must also give them certain specific information about the RIF itself. This is the most confusing, least understood, and most litigated area of the law of releases. The information employers must provide when they give employees releases for consideration includes a description of the following:
 - Any “class, unit or group” of employees considered for possible termination in the RIF, eligibility factors considered in making termination decisions and any time limits during which the RIF will take place.
 - The job titles and ages of all individuals in the employee’s “decisional unit” selected for termination in the RIF. (Their names need not be given.)
 - The ages of all employees in the same decisional unit who were not selected for termination. (We believe that you must also include their job titles, too.)

Conclusion

What should you take away from all this? First, carefully consider and review all your obligations in the event of a RIF as well as individual terminations. Even when it appears that you are using sound business reasons, look at all of the protected class information on the affected employees. Finally, communicate with employees to minimize the shock and anger that most employees feel when terminated. Explain their options and provide support for them as they move into the work force.

Sample Policies

OWBPA Disclosure Form for Group Terminations*

As a consequence of the elimination of your position with [Name of Company], you are eligible for severance benefits. To receive benefits, you must sign the Severance and Release Agreement you have been given within forty-five (45) days of receipt and return the signed original to [Name], [Name of Company], [Company Address].

In accordance with the requirements of federal law, the following is a list of job titles and ages of those employees in your department (see below) who are eligible and ineligible for severance benefits. Employees listed as “ineligible” are ineligible because they are not being terminated. This list was prepared as of [Date].

Job Title	Age(s) of Eligible Employees	Age(s) of Ineligible Employees	Eligibility Factors
Job Title	56	N/A	Elimination of position
Job Title	63	N/A	Elimination of position
Job Title	41	36	Skills and/or experience
Job Title	60	N/A	Elimination of position
Job Title	42, 25	34, 23	Skills and/or experience
Job Title	53	35	Skills and/or experience
Job Title	38	N/A	Elimination of part-time position
Job Title	27	41	Skills and/or experience

*The statutory language should also be included as an attachment to this disclosure form.

Sample ADEA/OWBPA Release Language

Waiver of Claims Under the Age Discrimination in Employment Act (ADEA). Employee hereby acknowledges that he/she has been referred to the Age Discrimination in Employment Act (ADEA 29 U.S.C.S. §§621 et seq.), the Older Workers’ Benefit Protection Act (OWBPA), and the regulations promulgated and set forth at 29 C.F.R. Part 1625 and the Equal Employment Opportunity Commission Complaint Procedures, 32 C.F.R. Part 588. Employee is also advised he/she has various rights, and may have, after reviewing the regulations, certain claims arising under the ADEA.

Employee hereby knowingly and voluntarily waives and releases any private rights that he/she may have under the ADEA and the OWBPA. Employee acknowledges that he/she has sufficiently deliberated the waiver of his/her rights, has been encouraged to consult with his/her lawyer before signing this Agreement and, thus, knowingly waives and releases any private rights that he/she may have. This Agreement shall not act as a waiver of any rights or claims that may arise after the date on which the Employee signs this Agreement.

EMPLOYEE HAS BEEN PROVIDED WITH AN OWBPA DISCLOSURE NOTICE AND HAS BEEN ADVISED THAT HE/SHE HAS FORTY-FIVE (45)* DAYS TO CONSIDER THE TERMS OF THIS WAIVER BEFORE SIGNING IT AND IS ENCOURAGED TO AVAIL HIMSELF/HERSELF OF THIS PERIOD OF TIME.

To be effective, the Employee's rescission must be in writing and delivered to [Name], [Name of Company], [Company Address], either by hand or by mail within the relevant rescission period. If sent by mail the rescission must be: (a) postmarked within the seven-day period; (b) properly addressed to [Name], [Name of Company], [Company Address], and (c) sent by certified mail, return receipt requested.

Rescission of Claims Under the Age Discrimination in Employment Act (ADEA). Employee understands that he/she may rescind (that is, cancel) this Agreement within seven (7) days under the ADEA. To be effective, the Employee's rescission must be in writing and delivered to [Name], [Name of Company], [Company Address], either by hand or by mail within the relevant rescission period. If sent by mail the rescission must be: (a) postmarked within the seven (7) day period; (b) properly addressed to [Name], and (c) sent by certified mail, return receipt requested.

*Under the ADEA, the consideration period is twenty-one (21) days.

How to Handle Reductions in the Work Force Preparations: What to Say

Just as you need to prepare for a hiring interview, you need to get ready for a separation meeting. Know what you want to say before you meet. Write down your thoughts. Rehearse once or twice what you will say and how you will say it (how you say it is very important, since this is an emotional situation). What follows is a general guideline for use during a separation meeting. Remember, each layoff situation is different and there may not be a need for an extensive meeting with an employee. If you get stuck when preparing for the separation meeting, don't guess. Consult with an HR professional or seek legal counsel before the meeting.

- 1) ***After the usual courtesies, get quickly to the point.*** Place the decision within the context of what is going on at the company and make a clean, clear statement about the decision that has been made. For example, "As you know, John, the company is facing severe budget cuts and every department has been asked to reduce their budgets for next year. As a result, your position has been eliminated." Do not be defensive or feel you must persuade the person that the action is justified. Just state your case with conviction.

However difficult this meeting may be for you, it is even harder for the employee. Do not get on the topic of your needs, feelings or problems. It is not helpful to say, "I know how you feel," because you don't. Even if you were once terminated, each person feels things differently and has a right to do so. However, do try to be sensitive to the feelings and emotions of the employee both at the time of the separation meeting and in the days to come.

- 2) ***People who are separated have a right and a need to know the reasons for the decision.*** Since separations due to a RIF are no-fault terminations, it is important to stress that the decision did not involve personality. Also, stay off the topic of criticizing the company. This is not a time to place blame on anyone.

The reason should be clear in your mind so you can make it clear to the employee. For example, "We are going to have to eliminate the program you administer to stay within our budget." The situation is particularly difficult if the position you are eliminating is similar or has the same duties as other positions in the office.

- 3) ***You should review the company's policies and procedures for a RIF.*** Since employees cannot absorb everything at once, it is both necessary and courteous to provide some written materials, typically a letter that would have all the information that would be necessary for them to move forward with obtaining unemployment benefits and/or continuing health benefits.

Quite often during a RIF, managers feel it is the appropriate time to evaluate a staff member's performance. In reality this is not the time. It is important to manage unsatisfactory performance issues separately from and before the RIF process.

Employee performance problems should be addressed appropriately through performance management and corrective action. Managers often assume that because employees are not doing one job well they are unqualified to do other jobs. Hopefully through a performance management process, you have accurately assessed employees' skills and have a thorough understanding of their skills as well as their areas for development. With this insight, you – as a manager or HR professional – will be equipped to guide the employee, if appropriate, to other internal positions.

- 4) ***The separation meeting may or may not be the best time to discuss a transition plan.*** Depending on the employee's morale, you may want to discuss the arrangements for transferring his or her work at the first follow-up meeting. The employee may need to transition some work immediately so he or she can focus on the job search. In some situations, this will be the last day of the employee's employment.

You may also want to discuss with the employee how he or she would like to have the news communicated to the remaining employees. Be respectful of the employee's feelings – he or she may want to tell co-workers personally.

At this point, the employee may experience shock and disbelief. Instead of overloading the employee with information, stop here, give him or her 24 to 48 hours to absorb what is happening and schedule another meeting for the two of you in the next two days. Hopefully, at the initial follow-up meeting, the employee will be prepared to discuss next steps. Provide the employee with information about any employee assistance program (EAP).

If you are reducing a large number of staff at one time, a team of HR professionals may be established to help employees and managers work through the process and better understand their options.

- 5) ***Your involvement may not end with the termination meeting.*** If the employee is staying for some period of time, find ways to show your continuing support. Please keep in touch and make yourself available, in addition to following up on the parts of the separation or job abolishment process for which you are responsible.

Be sensitive also to the co-workers of the separated employee. Communicate to them the job abolishment decisions and provide a process and time to discuss their feelings. They may be experiencing such feelings as guilt, embarrassment, a lack of trust, suspicion, confusion or shock. Again, the EAP is a good resource in these situations.

For More Information

This article is one of 25 chapters on the most recent HR developments published in *Human Resources 2009: Answers to Your 25 Top Questions, Winter Edition*.

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