Updates
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Plan for Workforce Reductions Now To Avoid Delay and Liability

Recent news has shined a spotlight on the legal consequences of mass layoff situations. Employers should take steps now to prepare for possible reductions in their workforce. By being aware of the potential pitfalls and legal ramifications of layoffs, as well as the opportunities to provide meaningful severance benefits to departing employees and retention benefits that have a low cash cost for remaining employees, employers may help lower their legal exposure and can motivate remaining employees to help improve the company's business prospects.

**What Triggers Liability Under the WARN Act?**

Failure to comply with the requirements under the Worker Adjustment and Retraining Notification (WARN) Act can be costly and may lead to class-action litigation. The WARN Act requires employers with 100 or more employees to provide written notice 60 days in advance of plant closings and mass layoffs (or pay and benefits in lieu of notice).

- **Plant Closing.** The WARN Act is triggered if an employment site (or one or more facilities within an employment site) is shut down, and the shutdown will result in employment loss for 50 or more employees during any 30-day period.
- **Mass Layoff.** The WARN Act is triggered in a mass layoff (that does not result in a site closing) when an employer does either of the following:
  - Lays off 500 or more employees at a single site of employment in a 30-day period.
  - Lays off at least 50 employees in a 30-day period, and the layoffs constitute 33% or more of the employer's total active workforce (not including part-time workers) at a single site of employment.

Keep in mind that terminations occurring up to 90 days before or 90 days after a reduction in force may need to be aggregated when calculating these numbers. Employers should also be aware of any so-called "mini-WARN Acts" in the states where they operate.

### How Should Employers Plan for a Reduction in Force?

To mitigate potential liability, early and careful planning is required.

Employers should designate a committee composed of upper management representatives from the employer's human resources, finance, legal, information technology (IT), and stock administration departments who are well-acquainted with the employer's reduction in force (RIF) process. The committee should take the following actions:

- Create criteria to identify RIF candidates that are objective, consistently applied, and defined well in advance of any selection process.
- Determine the number of positions to be eliminated now and in the near future.
- Track RIF plans and terminations that have occurred in the 90 days prior to the RIF and flag possible actions that could trigger the WARN Act.
- Note whether WARN Act exceptions—natural disasters, unforeseeable business circumstances, or the "faltering company" exception—apply.
- Document the business reasons for the RIF and the individual justification for the selection of each employee to defend against potential claims of discrimination by former employees.
- Determine whether severance (in addition to any pay/benefits in lieu of WARN notice) should be provided to secure a release of claims.
- Discuss severance packages, including any amendments to outstanding equity awards, with the employer's board of directors prior to finalizing the RIF paperwork.
- Have the board make any stock option or other equity award grants previously promised (but not yet granted) to employees who will be affected by the RIF.
- Prepare the supplemental materials required for compliance with the Older Worker Benefit Protection Act (OWBPA).
- Establish a procedure to ensure the transfer of necessary account logins and passwords, company property such as laptops or key cards, and confidential company information from the affected employees to the employer and to terminate employee access to company information systems.

As additional measures, employers should consider establishing a separate committee to review all RIF decisions and instituting a hiring freeze.

### What Other Legal Issues Should Employers Consider When Implementing a RIF?

The WARN Act is not the only legal issue employers must consider when facing a RIF.

Prior to selecting individuals for the RIF, employers should review employment contracts as well as equity award agreements to confirm any rights to severance, equity acceleration, waivers of repayment obligations for signing or retention bonuses, and impact on employees who may be sponsored by the company for work authorization (such as a visa or pending green card application). Employers should consider whether promises were made to affected employees for equity compensation grants and take any actions necessary to formally approve those grants prior to the termination of that individual's service. Additionally, employers should review the stock plan and standard post-termination exercise periods to determine whether amendments to outstanding awards as a form of severance are appropriate. Waiver of the first-year cliff vesting provision, permission to use "net exercise" (i.e., a cashless exercise) to pay the exercise price (but not taxes), the extension of the deadline to pay outstanding promissory notes used to purchase shares, and the extension of the post-termination exercise period for up to one or two years after termination can be a meaningful, cash-free form of consideration for a release of claims.

If the employer wishes to offer an amendment to outstanding equity awards, it is important to have the company's board of directors approve these amendments *prior* to the termination date and to clarify whether entry into a release of claims agreement is a condition to the award amendments. Keep in mind that some of these amendments may affect the status of options as "incentive stock options," triggering an employer withholding tax obligation if and when those options are exercised. Also, remember that an employer's forgiveness of outstanding promissory notes entered into by an employee is likely to be treated as compensation that is subject to a withholding obligation.

Employers should also review employees' Propriety Information and Inventions Assignment Agreements (PIIAAs) to evaluate the enforceability of any noncompete, nonsolicitation, nondisparagement, and/or confidentiality obligations. State laws may have changed since those documents were drafted, which may limit the ability to enforce those provisions.

In addition, employers should also consider whether employees have recently engaged in protected activity?such as complaining of discrimination, harassment, or retaliation, utilizing leave benefits, or filing a worker's compensation claim?such that their layoff might give rise to a retaliation/wrongful discharge claim.

Employers should also analyze final RIF decisions through a disparate impact analysis to ensure the RIF is implemented in a nondiscriminatory manner. Under Title VII of the Civil Rights Act of 1964, as well as many state equivalents, employers can be held liable for seemingly neutral employment practices that adversely affect members of protected classes. As a result, RIF decisions should factor in whether employees in a protected class are affected by the anticipated RIF more than what would be statistically expected given the demographic of the employees in the workforce.

In addition to the disparate impact issues, employers should be aware of the Older Workers Benefits Protection Act, which imposes detailed requirements for agreements that release age claims for workers ages 40 and older. Moreover, employers should understand the impact of releasing age claims because, in a typical RIF, employees aged 40 and older are entitled to 45 days to decide whether to sign the separation agreement and seven days to revoke their signature as well as to supplemental disclosures showing the ages and positions of all employees who are and are not chosen for termination of employment.

**Employers Should Communicate With Their Workforce Early and Often**

To reduce anxiety and rumors, employers should communicate timely information with employees before and after implementing a RIF.

Before implementing the RIF, employers should draft communication plans for affected and unaffected employees. Employers should designate company officials to deliver and discuss termination packages with affected employees. If affected employees are staying on to provide transition services, employers may wish to prepare a transition service agreement for each affected employee.

After the RIF, employers should address the remaining employees. To assist with low morale or other negative effects of the RIF, employers should explain the business justifications for the RIF and discuss any changes in the remaining employees' employment duties, compensation, or benefits?and whether employees should expect more layoffs in the near future. In addition, employers should be aware that employees who are "survivors" of RIFs may feel guilt or anger and may lack the motivation to return their focus to helping the company succeed. Employers should consider their strategy for the retention and motivation of these employees. Some employers address this through a program to reprice stock options that may be "underwater" or by granting retention equity grants. Additionally, when employers provide an extended post-termination exercise period to the employees whose service ended in the RIF, the remaining employees may find the motivation to help turn the company's business around and increase the value of the company's stock so that their departing colleagues' equity awards have value in the near future.

Given the numerous federal, state, and local laws relevant to a RIF, employers contemplating a RIF should work closely with counsel to ensure proper compliance with applicable laws and to mitigate the emotional impact of the RIF on their workforce.



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