

# Considering an Early Retirement Program? Make Sure You Plan Ahead

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Recently, [we examined](#) the wisdom and legality of mandating retirement for older workers. The gist of that analysis was “don’t do it” except in limited circumstances — and certainly don’t do it without talking to your legal counsel first, as such mandates directly implicate age discrimination liabilities under the Age Discrimination in Employment Act (ADEA) and ancillary state and local civil rights laws.

But what about *voluntary* early retirement incentive programs (ERIPs)? Can an employer implement a voluntary incentive program to coax some of its more-senior employees into hanging up their hats? The answer is “yes,” but proceed cautiously.

## Why Implement an ERIP?

Employers use ERIPs for a variety of reasons, including bottom-line cost cutting, encouraging healthy turnover, and minimizing entrenchment, to name a few. Whatever the basis of an employer’s decision, it must consider certain basic business and legal principles before implementing an ERIP, such as:

- the employer’s ultimate staffing goal following the completion of the ERIP;
- the number and types of employees included in the ERIP;
- whether the ERIP will trigger certain obligations under federal or state Worker Adjustment and Retraining Notification (WARN) Act laws based on the projected number of retiring employees;
- disclosure obligations and consideration and revocation periods required under the ADEA and the Older Worker Benefits Protection Act (OWBPA); and
- possible ERISA concerns.

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The Equal Employment Opportunity Commission (EEOC) has [helpful guidance](#) employers should review when developing an ERIP.

## Questions to Consider

Before implementing an ERIP, an employer should ask itself some questions to help focus the scope of the ERIP, thereby ensuring its success and avoiding legal pitfalls:

- **Who should be eligible?** When determining which employees can participate in the ERIP, employers must focus on objective criteria (rather than simply on age). These criteria typically include things like department, title, length of service, age, work location, etc., or a combination of these criteria. For example, an employer could offer the ERIP to employees who (i) have at least 15 years of service, (ii) are in a senior management position or above, and (iii) will be at least 60 years old on the applicable retirement effective date.
- **What if not enough employees opt in to the ERIP?** There's a bit of carrot and stick process involved in a typical ERIP. Obviously, the goal of an ERIP is to incentivize a critical mass of the targeted group of employees to retire. The employer must therefore offer incentives generous enough to convince the targeted employees to participate in the ERIP. But what can an employer do if there just aren't enough takers?

In that case, the employer could later conduct an involuntary layoff. However, the possibility of age discrimination is a more significant legal risk to the employer when conducting involuntary terminations — especially if all or a majority of the layoff targets are over 40 years old (the age at which the ADEA kicks in). So, from a practical perspective, an involuntary layoff initiated after an ERIP is offered carries risks the ERIP may not.

Clear communication to eligible employees about the incentives/advantages of opting into the ERIP versus the disadvantages of foregoing the opportunity is key to incentivizing enough employees to opt in. This could include highlighting the financial incentives of opting into the ERIP; providing a sufficiently long “window” during which employees can do so; and providing a clear statement that, after the ERIP window closes, the employer has no immediate plans to offer other similar programs in the future.

- **What if too many employees opt in to the ERIP?** On the flipside, if the incentives offered by an ERIP are too generous, too many employees may opt in, including employees the employer had hoped to retain. Careful planning and consideration of the eligibility criteria and the value of the incentives offered by the ERIP will help limit this risk.

For instance, health care coverage is likely a big consideration for employees considering whether to opt into an ERIP, so it's one benefit employers can use to incentivize (or not) particular employee groups to opt in to the ERIP (or stay clear of it).

There may be other benefits or incentives the employer can offer (or not) to encourage targeted employees to stay (or go, as applicable). As a result, an employer will need to consider the needs of its employee population when designing the ERIP benefit package.

- **How long should an employer give the target group to opt in to the ERIP?** The employer should obtain a release of claims (particularly age-related claims) from employees who opt in to the ERIP. So legally-required disclosures, notices, and revocation periods must all be considered to ensure an effective release of age claims.

For a release to be effective under the ADEA and OWBPA, an employer must give any employee who is (i) over age 40 and (ii) part of a “group” termination at least 45 days to consider the terms of a release of age claims, plus 7 days to revoke the release after signing. Similarly, if WARN Act reporting is triggered by an ERIP, the employer must provide affected employees with at least 60 days’ notice and disclose the termination to state and local agencies and elected officials.

As such, the ERIP’s election “window” should consider the timing requirements under these (and, possibly, state and local) statutes. The ERIP announcement sent to eligible employees should include (among other things) a description of the ERIP, the eligibility criteria, the dates the opt-in “window” opens and closes, and whom to contact for more information.

### **Careful Planning = A Successful ERIP**

A carefully considered ERIP can provide the means by which employers can encourage more senior staff to head for the exit. While an ERIP may take time and planning to implement, if structured thoughtfully and in consultation with legal counsel, it can be an effective tool for simultaneously reducing headcount, maintaining employee morale, and limiting legal risk to employers.

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