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Five Work Streams for Employers to Consider Before a RIF

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Employers often consider five key “work streams” at the initial planning stages of a reduction in force (RIF).

1. WARN Act and Mini-WARN Requirements

The federal Worker Adjustment and Retraining Notification (WARN) Act requires employers to provide sixty days’ notice prior to a “plant closing” or “mass layoff.” A plant closing or mass layoff can be triggered with as few as fifty employment losses at a single site of employment. The federal WARN Act is not new, and courts have not radically altered the interpretation or application of the law in recent years.

What is new (or newer) is the proliferation of state-law (“mini-WARN”) analogues. Depending on how one counts, some sixteen states have their own versions of the WARN Act. Some are voluntary; others contain requirements that mainly track the federal WARN Act requirements. However, several states have thresholds that are tighter (i.e., can be triggered more easily) than federal WARN. For example, the Maryland mini-WARN law can be triggered with as few as fifteen employment losses. The mini-WARN laws in Illinois, Iowa, and Wisconsin can be triggered with as few as twenty-five employment losses. Maine’s law requires severance in some circumstances. And California’s mini-WARN law—called “Cal/WARN”—departs from federal WARN Act requirements in many ways. Several other states have imposed other requirements. (New Jersey appears on the precipice of green-lighting a new law that will require ninety days of notice, and, in some cases, the payment of severance equal to one week of pay for each full year of employment.) Before a RIF is implemented, employers may want to carefully vet how many employees will be affected at locations in each state and check mini-WARN law requirements in those states.

2. Selection Criteria

An employer must be able to articulate legitimate and nondiscriminatory business justifications for the selections and terminations occurring within the RIF.

- *Position or group elimination*. Some groups, functions, or positions may be eliminated altogether—the work is going away. This might be the result of a contract that was lost, the

outsourcing of the work to another company, or the development of a technological resource to perform the work more efficiently. Defending selection decisions for these reasons typically means explaining and documenting the business rationale for position eliminations.

- *Selection among similarly situated employees*. In circumstances where the company selects some employees in a job classification or group, but not others within the job classification or group, it is useful to have developed clear selection criteria that decision makers can apply. This could include subjective factors and/or objective factors. It could include performance, skill sets, length of service, geographic location, or other criteria that advance the needs of the particular business unit or group. The criteria may be entirely different for various groups within the company. In the sales department, for example, the selection criteria might be based on dollars collected or pipeline dollars booked. In the human resources department, on the other hand, companies are likely to value different factors and therefore apply different criteria.

In some cases, employers may find it helpful to maintain final documents from this work stream (e.g., containing the reasons each employee was selected) in a separate, discoverable, and nonprivileged file that can be produced in response to a demand letter or discrimination charge. In discrimination litigation, these documents often form the basis for the company's defense—proof of the legitimate and nondiscriminatory reasons for the selection.

3. Statistical Review and Disparate Impact

Another work stream may involve a statistical review of the demographic characteristics of selected employees versus non-selected employees. For example, in a generic age-blind reduction in force, where 50 percent of the employees are over the age of forty, one would expect roughly 50 percent of the *selected* individuals to also be forty or over. However, if 90 percent of those individuals selected for termination of employment are forty and over, there could be a problem with the selection criteria or the decisions maker's application of it. To be sure, a statistical variance does not prove age discrimination (or any other motivation on the part of the decision maker). In many cases, there are nondiscriminatory reasons that may have contributed to the variance. For example, if a company eliminated all administrative assistants, all of whom were men, statistics alone would suggest that men were affected disproportionately as compared with women in this group. However, in this case, there were simply no women who could have been selected from the group, and oftentimes, this will be a satisfactory defense to a sex discrimination claim. As part of the due diligence process, many employers find it helpful to review the statistical analysis, explore any variances that are statistically significant, and identify nondiscriminatory reasons for the statistical variance.

4. Multistate Releases

Perhaps ten or fifteen years ago, multistate practitioners often approached their compliance obligations by drafting one agreement for California and a second agreement for the forty-nine other states. That has changed. Many states have enacted heightened requirements for separation and release agreements. For example, West Virginia—hardly the first state that comes to mind on the question of multistate employment law compliance—implemented several special requirements for group termination release agreements, including a forty-five-day consideration period and special disclosure rules, even for younger employees. If there is a confidentiality provision, Illinois requires a twenty-one-day review period and seven-day revocation period for all releasing employees, regardless of age. Minnesota requires inclusion of a fifteen-day rescission period for a release of

claims under the Minnesota Human Rights Act. In Maine, Massachusetts, North Dakota, and South Dakota, employers may want to catalogue specific statutes by name in order to effectuate a valid release of claims arising under such statutes. Many other states have special requirements that warrant state-specific tailoring.

5. OWBPA Disclosures

In order to effectuate a valid release of age claims under the federal Age Discrimination in Employment Act (ADEA), employers must adhere to special rules under the Older Workers Benefit Protection Act (OWBPA). In the context of a group termination of employment ("group" in this context means that more than one employee has been selected for employment termination), the OWBPA requires employers to provide employees with a written disclosure to inform the eligible individuals of:

- any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
- the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

The federal regulations provide a format for presenting this information that may be adapted roughly as follows:

Job Title	**Department**	**Age**	**Selected**	**Not Selected**
Sales research	Sales	25		x
Receptionist	Sales	29	x	
Maintenance technician	Sales	36		x
Maintenance technician	Sales	38		x
Maintenance technician	Sales	55		x
Administrative assistant	Sales	42	x	x
Administrative assistant	Sales	43		x
Sales representative	Sales	44	x	

Among other things, employers may want to include in the disclosure form the scope of the "decisional unit" and the eligibility or selection criteria.

Courts have applied a "strict compliance" standard to the requirements arising under the OWBPA, which can be especially challenging because the regulations are hardly a model of clarity or consistency.

Conclusion

Employers often consider the foregoing work streams as they create the architecture for a reduction

in force. To be sure, there are many other work streams that also may need to be considered, including severance plan development, employment agreement diligence, collective bargaining agreement diligence (if any), nondiscrimination training for supervisors, communication plans as they relate to selected employees and nonselected employees, tracking the process for signed separation agreements, outplacement, continuation of health benefit packets under the Consolidated Omnibus Budget Reconciliation Act of 1985, and final paycheck considerations and compliance with state-law requirements.

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