

# Employee Relations

## LAW JOURNAL

### **Navigating a Reduction in Force**

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*The author explains why employers must carefully consider and review their obligations in the event of a reduction in force and individual terminations.*

**N**o matter what you call it—a recession, a sluggish environment, or a downturn—it's clear that the economy is far from robust. Because job losses are an inevitable part of any economic downturn, it is wise to plan ahead, whether you believe your company will be able to weather the storm successfully or you expect to face the painful task of cutting jobs.

#### **PLANNING A RIF**

As with most situations, planning is key. Without a good plan it is easy to stumble into decisions that may make sense at the time but do not withstand later claims by employees who have lost their jobs. A good plan for a reduction in force (RIF) requires that you identify the tasks that need to be accomplished, those that will be eliminated, and the new structure that will accomplish these goals. Current employees' skills can then be aligned with the company's business needs and difficult, but well-considered, decisions made.

Unless your company handbook, policies, practices, individual employment contract, or collective bargaining agreements provide otherwise, layoff decisions can be based on legitimate business needs rather than seniority or other predetermined criteria. These criteria may, however, be tested by a court or administrative agency to determine whether they are truly job-related if the result is a disproportionate impact on employees in such protected classes as age, national

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origin, or gender. Generally, the more subjective the criteria, the more vulnerable they are to attack.

A RIF should not be used as a way to manage performance problems that have not been well-documented. The federal courts, including the US Supreme Court, have paid particular attention to this area in recent years and as a result, “riffed” employees (and their attorneys) are more aware of the legal requirements employers face when implementing a RIF. Since RIFs by their nature affect more than one employee, they are susceptible to challenge both as individual claims and class actions.

## LEGAL CHALLENGES

### ***Meacham v. Knolls Atomic Power Laboratory***

The US Supreme Court has agreed to hear an important RIF case this term, *Meacham v. Knolls Atomic Power Laboratory*. The employer needed to cut its workforce and, in doing so, rated its employees on “flexibility” and “criticality” skills. Of the 31 employees it identified for termination, 30 were older than 40. In an opinion supporting employers, the Second Circuit Court of Appeals held that decisions based on these criteria will usually be reasonable despite having a disproportionate impact on older employees. The US Supreme Court is expected to decide whether the terminated employees or the employer bears the burden of showing that the decision was based on reasonable factors other than age. Although technical in nature, the case should provide additional guidance as employers plan and conduct layoffs.

Given the risks inherent in a RIF, it is recommended that a preliminary evaluation be conducted before finalizing layoff decisions to see whether a particular class may be disproportionately affected by the layoff. If so, the employer must be certain that it can articulate legitimate business reasons for its action and that it has written records supporting its reasoning.

The evaluation should be done on a confidential basis. Adequate safeguards, such as consultation with counsel, should be built into the process to protect against its disclosure in the event of subsequent litigation. It is also important to consider the impact that the layoff will have on employees who are on Family or Medical Leave or workers’ compensation leave, whistleblowers, and employees about to vest in benefit plans, because these employees may have claims that the RIF interfered with their protected rights.

An assessment should also be made as to which employees are particularly prone to litigation, because an unsigned separation agreement that was offered to an employee can be used as evidence of wrongdoing in some circumstances. Armed with this information, the

employer can make an informed decision as to how best to structure the RIF to accomplish its business needs while minimizing the risk of claims.

RIFS, like individual terminations, raise the question whether to provide terminated employees with severance pay and, if so, whether to require a release of claims in return. Although separation agreements are often desirable, care must be taken to avoid the legal pitfalls associated with them. Before offering separation agreements to employees, it is critical to review all individual employment contracts, as well as existing policies, practices and collective bargaining agreements, and carefully comply with any requirements they contain. Careful drafting is the key to enforceable release agreements. Simply reusing a template used in the past is not a reliable approach.

### ***Older Worker Benefits Protection Act***

To be enforceable, a release of claims related to workplace discrimination must be “knowing and voluntary.” One federal law, the Older Worker Benefits Protection Act (OWBPA) specifies that for a release of federal age-discrimination claims by an individual employee to be knowing and voluntary, the employee must have had at least 21 days to consider the agreement before signing it. Although most discrimination laws are not this specific, offering 21 days for consideration of the full agreement, not only the release of age-related claims, offers considerable protection to the employer. In addition, the separation agreement should be written in such a way that the employee who signs it can reasonably be expected to understand it. The same document does not necessarily work for all employees in all situations. Employees who have limited English skills, have impaired mental capacity, or simply lack sophistication are not expected to understand a lengthy document full of “whereas” and “herein” clauses. If the language is not understandable by the particular employee, the release may be invalidated even after the employee has received severance pay.

Likewise, not all employment-related claims can be released. For example, claims for overtime under federal wage and hour laws and claims under state workers’ compensation laws cannot be released in most circumstances. The right to file a charge of discrimination with the US Equal Employment Opportunity Commission (EEOC) and most state human rights agencies also cannot be released, although the employee cannot recover additional monetary damages by pursuing the charge. The release of prospective claims is also prohibited. Again, careful drafting is the key to avoiding an invalid release.

The OWBPA imposes a series of very specific steps that must be taken when two or more employees are affected by a layoff and are asked

to release claims for age discrimination under federal law. Since many employees who are “riffed” are age 40 or 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 were and were not selected for the RIF within the particular decisional unit. An employer who does not strictly comply with the OWBPA’s requirements risks paying severance only to find that a lawsuit for age discrimination is not barred by the signed agreement.

Guidant Corp. learned this lesson the hard way. In a highly publicized case, *Pagliolo et al. v. Guidant Corp.*, a federal court in Minnesota held that the information Guidant provided in connection with a RIF failed to satisfy the OWBPA in several ways. These included providing dates of birth rather than the actual age of affected employees, treating the company’s six different subsidiaries as one decisional unit, and failing to disclose the criteria used to select employees to be laid off. Although not all courts read the OWBPA’s requirements as literally as this court did, the decision is one that employers contemplating RIFs, particularly in Minnesota, must consider.

### ***The WARN Act***

Layoff decisions can also implicate the federal Worker Adjustment and Retraining Notification Act (WARN) and its state counterparts. The WARN Act requires that employers with 100 or more employees give at least 60 days notice to affected employees in cases of a “mass layoff.” 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 the employees’ attorney’s fees.

## CONCLUSION

Employers are well-advised to carefully consider and review their obligations in the event of a reduction in force (RIF) and individual terminations. Even when sound business reasons dictate that reductions must be made, navigating the minefield of potential legal claims requires careful and thoughtful planning to minimize exposure.

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