Reductions in Force/WARN Act

PRACTICE GROUP

- Reductions in Force (RIFs)—Planning, Compliance, and Implementation
- WARN Act—Workforce Analysis, Practical Advice, and Notice Preparation
- Adverse Impact Analysis—Design and Statistical Evaluation
- Severance Plans and Agreements—Preparation and Compliance

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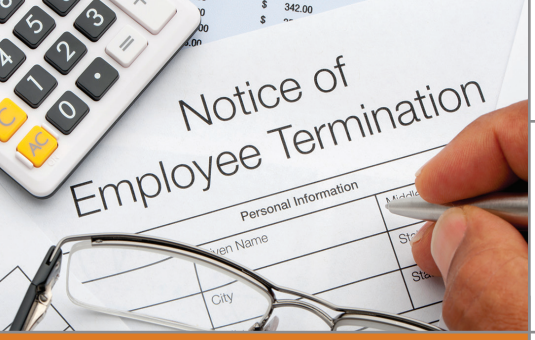

Reductions in Force/WARN Act

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Our RIF/WARN Act Practice Group can guide you through the difficult choices an employer faces in planning and implementing reductions in force and layoffs.

REDUCTIONS IN FORCE AND LAYOFFS: HOW TO DO THEM RIGHT

Is your business expanding due to a merger? Are industry changes creating a need to reorganize and restructure your current workforce? Has your business lost a large contract or has there been a softening demand for your products? All of these scenarios can create a need for your business to reduce costs or address redundancies. How do you handle these events in a cost-effective manner and still comply with the often vague and confusing federal and state law requirements for multiple-employee separations?

Our RIF/WARN Act Practice Group can help. Our attorneys have extensive experience working with businesses in almost every industry. We are knowledgeable in designing reduction in force (RIF) policies and RIF selection documents to help employers of all sizes defend against discrimination claims. We have advised numerous clients on the complex and sometimes ambiguous requirements of the Worker Adjustment and Retraining Notification (WARN) Act and the Older Workers Benefit Protection Act (OWBPA). In addition, our attorneys are well-versed in the intricacies of the Employee Retirement Income Security Act (ERISA) and the federal tax code and how they affect RIFs. We have experience designing voluntary and involuntary severance plans to meet the requirements of these laws. We can also help ensure that severance packages and agreements address each employer's particular needs and comply with the latest federal and state court decisions covering multiple-employee terminations.

Our services include:

- developing a strategic plan for the RIF, including preparing the documents to guide and support the RIF selection process and drafting severance agreements that comply with the requirements of the OWBPA;
- assessing whether a RIF triggers WARN Act coverage (under both federal WARN and state "mini-WARN" Acts), including determining employer coverage and the number of employees affected, identifying part-time employees for purposes of making coverage decisions, understanding the legal requirements covering temporary employees who may be working at impacted sites, and defining the single "site of employment" that serves as the basis for analyzing whether the WARN Act is triggered;
- determining and assessing WARN "look-back" and "look-forward" periods and events;
- preparing WARN-compliant notices to affected employees and government officials;
- conducting statistical analyses of RIF selection decisions within the attorney-client privilege, which allows for a full and frank discussion of the legal risks associated with a RIF;
- preparing OWBPA-compliant disclosure materials, including addressing changes in employee status before and after RIF decisions are made and addressing inclusion of foreign workers (and related immigration issues) in RIFs;
- preparing multiple-termination severance and separation agreements that meet federal and state standards for obtaining valid releases;
- assessing for unionized employers whether the business has a duty to bargain over the RIF decision and/or the effect the RIF will have on the business under a collective bargaining agreement;
- preparing an ERISA-compliant severance plan to provide significant substantive and procedural advantages in the event of litigation; and
- structuring the severance payments to reduce the likelihood of adverse federal tax consequences.

WARN ACT: COMBINING COMPLIANCE ADVICE WITH AN UNDERSTANDING OF BUSINESS NEEDS

Under the federal WARN Act, employers must give 60 days' notice of a covered plant closing or a mass layoff. Sounds simple, right? The federal WARN Act and its companion regulations appear straightforward, but they are not. For multi-state employers, the complexity increases given that at least a dozen states—including California, New York, and Illinois—have "mini-WARN Acts" that impose their own requirements for conducting a mass layoff or plant closing. From determining who is an employee, who suffers an employment loss, and what constitutes a single site of employment for statutory coverage to how to address separate layoffs within a rolling 90-day period, the federal WARN Act and its state counterparts are full of challenging issues. These issues often require employers to leave the realm of black-and-white answers and enter a gray area that requires difficult cost-benefit decisions. Our experienced lawyers can assist with this analysis.

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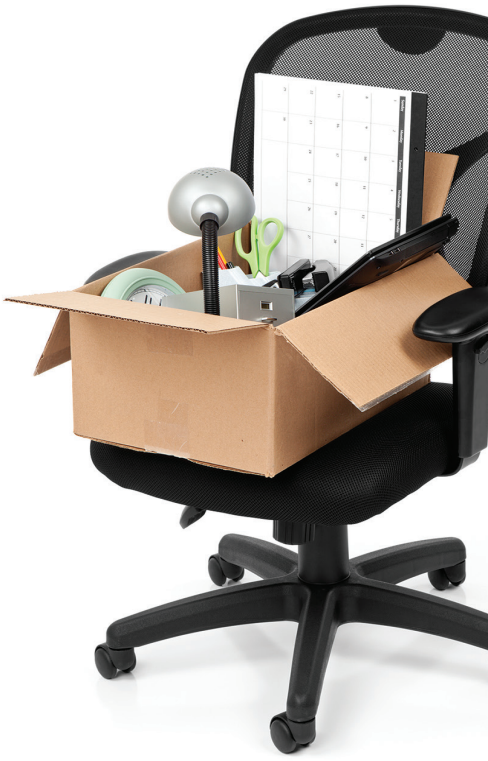
THE OWBPA: DECISIONS, DECISIONS

When an employer conducts a RIF, it usually will require a release and waiver of claims from employees selected for the RIF in exchange for severance benefits. If an employer selects employees 40 years of age or older for a RIF and seeks a waiver and release from the employees, the OWBPA kicks in, adding another layer of complexity to an already challenging process.

Normally, if an employer is discharging a single employee, the employee is 40 or older, and the employer asks for a release of claims, the OWBPA requires the employer to include specific language in the release and give the employee 21 days to consider whether to sign the release and 7 days to revoke the agreement after signing. When a RIF affects more than one employee and at least one of those employees is 40 or older, however, the law requires the same series of statements but gives the older employee more time to consider the release. More importantly, the law also requires the employer to give specific disclosures—particularly job titles, ages, and eligibility criteria—to the older employees about all employees in the "decisional unit" who were considered for the RIF.

Because failing to comply with OWBPA requirements can result in an invalid release and expensive and time-consuming litigation (including class actions), it is critical that employers seeking a release of age claims as part of a RIF provide accurate, understandable information to older employees about who was considered for the RIF. Ogletree Deakins RIF/WARN Act attorneys can guide employers through the OWBPA maze, including determining who is considered in the "decisional unit" and how to present required disclosures in a manner that is defensible and aligned with the RIF decision-making process.



DRAFTING SEPARATION, SEVERANCE, AND BENEFIT PLANS

When it comes to developing legally-compliant severance plans, one size does not fit all. Every employer has a different workforce, benefits structure, and business culture—the variations are endless. Our attorneys help clients decide how to choose the correct plan by walking them through the tough questions such as:

- What benefits will you pay to those employees selected to be part of a RIF or who elect to terminate employment under a voluntary RIF?
- Are the benefits to be paid part of an already-existing severance plan, or will a different benefit be provided to the group of employees who are part of a particular RIF?
- How can you use ERISA with its preemption of state laws and federal court jurisdiction to improve your defenses against possible claims?
- Can or should you be subsidizing COBRA, and what is the best way to integrate any RIF benefit extension with COBRA?
- Will a RIF result in unexpected funding and reporting obligations under your pension plan?

We also can provide guidance on the most common benefits provided to RIF participants, such as the length and amount of severance pay and continuation of medical benefits, and assist in drafting the necessary documents.

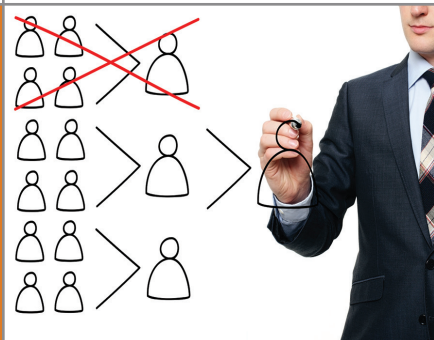
IMMIGRATION ISSUES

Our immigration lawyers can guide an employer in communicating with United States Citizenship and Immigration Services (USCIS) about changes in the terms of employment, determining whether the employer must pay for return travel for foreign nationals on certain visas who are laid off, and explaining how the layoff might impact the employer's foreign nationals who are involved in the green card process.

With offices across the United States and in Europe, Canada, and Mexico, the firm represents a diverse range of clients.

We operate efficiently without compromising our commitment to service.

Ogletree Deakins is one of the nation's largest labor and employment law firms, representing management in all types of employment-related legal matters.



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