

**Weathering the Storm:
Strategies for Avoiding
Employment Law Mistakes
During Hard Economic Times**

Linda D. Walton and Laura M. Solis

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Today's Presentation

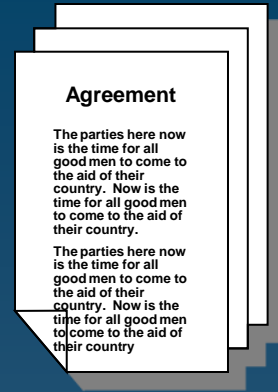
- Reductions in Force
 - Planning
 - Execution
- Hiring After a Reduction in Force
 - Employees
 - Independent Contractors
- Alternatives to Reductions in Force

Planning for a RIF

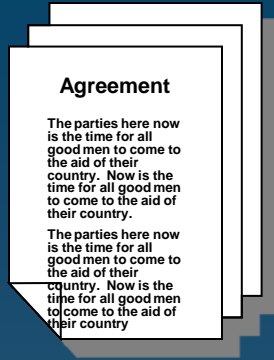
- **Be Prepared!**
 - Reviewing Documents and Policies
 - Selection Criteria and Methodology
 - Working with Legal Counsel
 - WARN Act Notices

Documents and Policies

- Collective bargaining agreements
- Offer letters
- Employment agreements
- Employee handbooks



Documents and Policies



- **Review regarding:**
 - term of employment
 - “cause” requirements for discharge
 - process for terminations
 - pay and benefits available upon termination
 - collective bargaining agreement bumping rights

Justifying the Decision



- Courts and juries understand economic layoffs
- But decision as to whom to lay off or which positions to eliminate is always subject to challenge

Discrimination

- Age
- Sex
- Marital status
- Sexual orientation
- Race
- Religion/Creed
- Color
- National origin
- Honorably discharged veteran or military status
- Disability
- Citizenship
- ERISA (layoff to avoid pension vesting or benefits obligations)

Justifying the Decision



- There should be a justification for each decision as to an individual, position or class of employees or positions
- Complete honesty as to reasons is key
- In all discussions, especially in writing avoid even appearance of bias
 - Train/remind managers

Retaliation

"Protected Activity"



- Complaints about or opposition to discrimination/retaliation
- Exercise of rights:
 - Requesting disability accommodation
 - Requesting or taking FMLA leave
 - Filing workers' comp claim
- Whistleblowing/public policy

"The Numbers"



- Does the RIF have an adverse impact on a particular protected group? (e.g., employees age 40 and over, women, African Americans)
- Appearance of bias (where numbers are too small for statistical significance)
- You must work with legal counsel!

The WARN Act

- WARN applies to employers who employ 100 or more full-time employees in aggregate, or who employ **100 employees** who, combined, work 4,000 hour per week
- WARN requires employers to provide **60 days' advance notice** to affected employees before certain events:



The WARN Act

- **Plant Closing** – permanent or temporary shutdown affecting 50 or more employees in 30-day period (can be extended to 90 days)
- **Mass Layoff** – employment loss at a single site affecting 500 employees or 50 or more employees constituting 1/3 of the workforce at that site



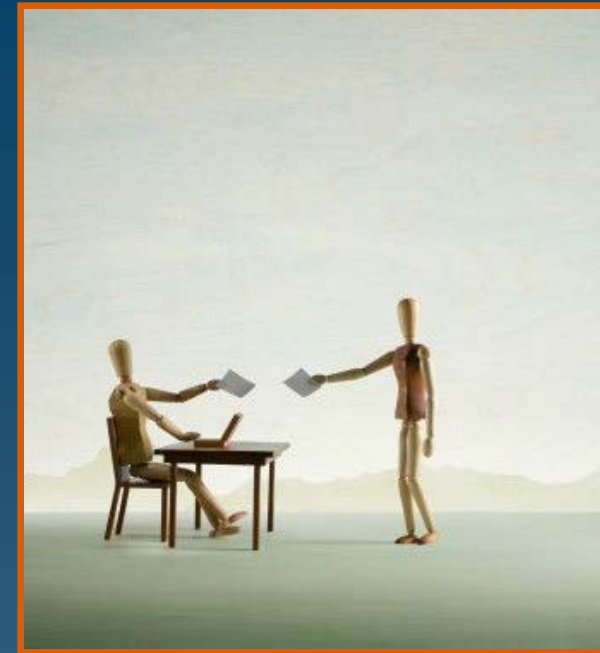
"Employment Loss"

- Layoff exceeding 6 months; or
- 50 percent reduction in hours during each month in a 6-month period



Don't Count:

- Employees discharged for cause
- Employees who voluntarily quit
- Employees who retire
- Certain part-time employees
- Employees offered a transfer to another location within a reasonable commuting distance



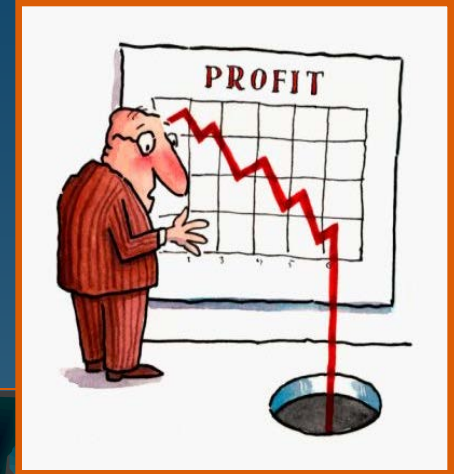
Exemptions from WARN Act

- Closure due to bona fide strike or lockout
- Layoffs and closing caused by completion of a project



Exceptions to Advance Notice:

- Unforeseen business loss
- Economically unstable company seeking capital investors
- Consolidation or relocation
- Natural disaster
- Employer may still need to provide notice as soon as layoff or closing becomes reasonably foreseeable



The Notice

Notice

Now is the time for all good men to come to the aid of their country.

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Chris Knowlden

- Notice must be provided to affected employees, as well as state and local agencies
- Notice must be tailored, including timeline for layoff
- Compliance enforced through private suits:
- Up to 60 days of pay and benefits
- Civil penalties up to \$500 per day for 60 days for not sending notice to affected state and local governments

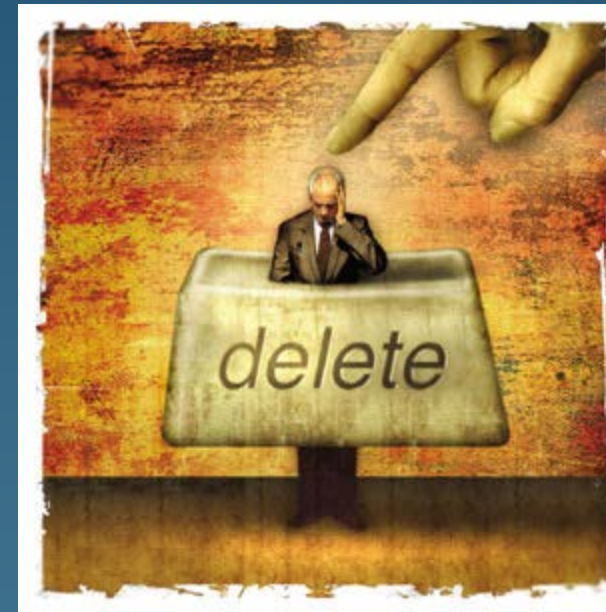
The FOREWARN Act



- Would apply WARN to businesses with over 50 employees
- Plant closing would include shutdown affecting 25 workers
- Mass layoff would be layoff affecting 100 or more workers
- Notice requirement increased from 60 to 90 days
- Penalty increased to parallel notice requirement and doubled – for each day that company did not provide required notice, 2 days pay as penalty

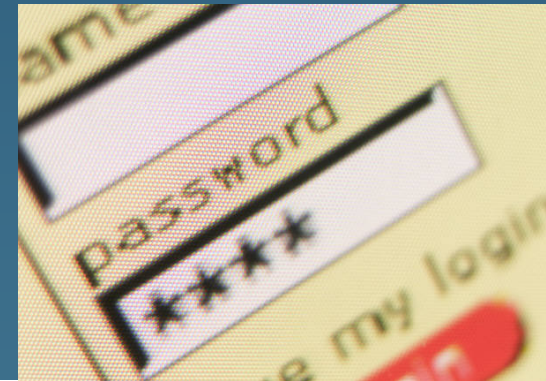
RIFs: Execution

- Communications strategy
- Layoff meetings
 - Protection of IP
- Public Employers
- Obtaining Releases



Communications Strategy

- What to say, and when?
 - Identify a Principal Spokesperson
 - Draft Information Sheet
 - Q&A Form
 - Benefits Summary



Layoff Meetings

- Plan meetings in advance
- In person with HR
- Designate one person to run meetings
- Have checklist of topics to cover
- What not to say: "stray remarks"
- Stick to script
- Listen carefully



Layoff Meetings

- Return of property and company information
 - Laptops, cell phones, pagers, Blackberries, etc.
 - Identification and security access
 - Company credit cards
 - Void passwords or other codes
 - Email and ISP accounts
 - Confidential proprietary info



Layoff Meetings

- Reminder of post-employment obligations (confidentiality, noncompetition, nonsolicitation); provide copies of relevant agreements
- Benefits continuation (including COBRA, if applicable, and 401(k) options)
- Stock options
- Severance offers



COBRA



- Continuation of medical insurance at employee's expense for up to 18 months or until employee becomes covered under another group insurance plan
- **New Stimulus Bill provisions:**
 - Covers any qualified beneficiary who becomes eligible for, and elects, COBRA continuation coverage due to involuntary termination between Sept. 1, 2008 and Dec. 31, 2009
 - Creates a subsidy of 65% of COBRA premium for up to 9 months

Layoff Meetings

- **Contact information**
 - Employee's information
 - Contact at employer (e.g., re benefits questions)
- **Reason for layoff**
 - No ambiguity or backsliding
 - Keep it simple
 - Listen . . . but keep to the schedule
 - Don't argue
 - Don't make promises
- **Exit interview**

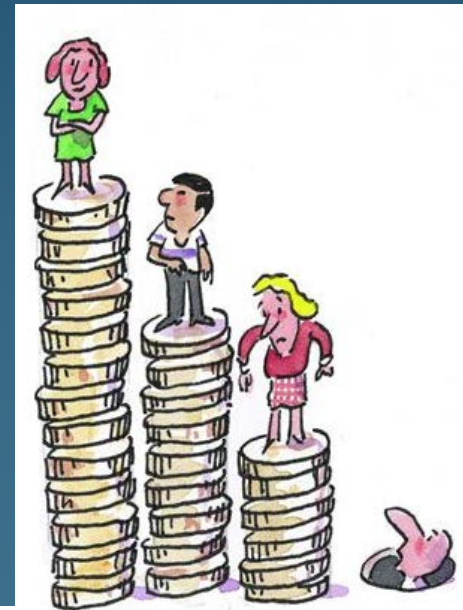


Public Sector Pre-Termination Hearings

- Loudermill Hearings for Layoffs?
- No:
 - Franks v. Magnolia Hosp. (N.D. Miss. 1995)
 - Mayfield v. Kelly (D.D.C. 1992)
- Yes:
 - Levine v. City of Alameda (9th Cir. 2008)

Severance Pay and Releases

- Always ask for a release
 - Notwithstanding same can be evidence in discrimination lawsuit
- Employees age 40 and over:
OWBPA



OWBPA



- Must be knowing and voluntary waiver
 - Plain language understandable to average participant
 - Specific notice language
- Consideration and revocation periods
 - Individual employee: 21 / 7
 - Group program: 45 / 7 plus information
 - Consideration period – employee can waive
 - Revocation period – employee cannot waive

Group Termination Program: Layoff Information

- Knowing and voluntary
- State who was and who was not selected for layoff, by age and job title
- No definition of "job classification or organizational unit" in statute
- EEOC defines "decisional unit"
- 29 C.F.R. § 1625.22



Group Termination Program: Layoff Information

Job Title	Age	# Selected	# Not Selected
(1) Mechanical Engineers, 1	25	21	48
	26	11	73
	63	4	18
	64	3	11
(2) Mechanical Engineers, 2	28	3	10
	29	11	17
	(Etc.)	(Etc.)	(Etc.)

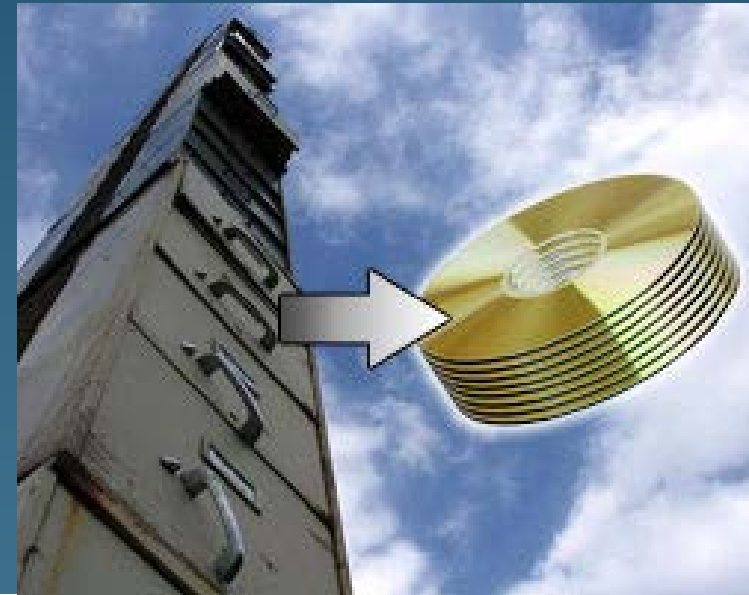
Group Termination Program: Layoff Information

- Tender Back Rule:
 - If the waiver is not valid, the employee may pursue a lawsuit without first returning benefits received under the agreement.



Document Retention

- Various statutory requirements
- Rule of thumb:
Three years (Washington)
- Lily Ledbetter Fair Pay Act

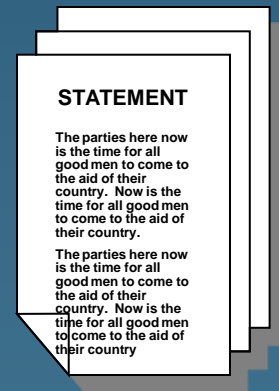


After a Layoff

- Statement of Reasons
- Hiring
 - Employees
 - Independent Contractors
- Exposure to Other Types of Lawsuits

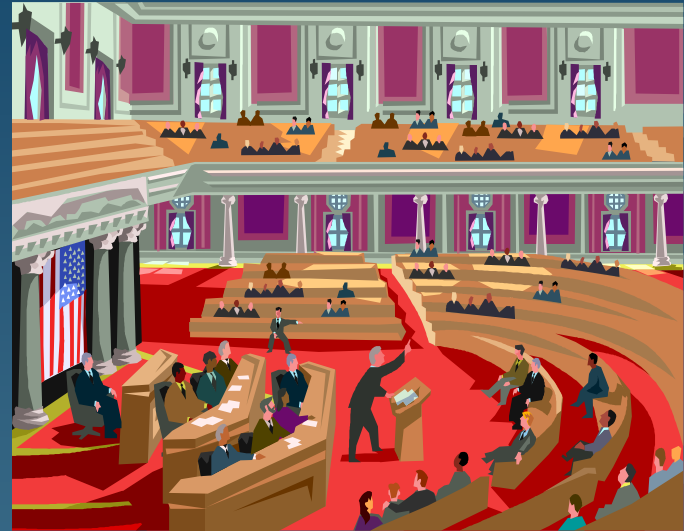
Written Statement of Reasons

- Employees can demand a written statement of the reason for their discharge
- Employer must provide it within 10 days of request. WAC 296-126-050(3)
- Exhibit A in any lawsuit
 - Counsel should review



Independent Contractors

- Employee or Independent Contractor?
- Various Statutory and Common Law Tests
- Expected Federal Legislation



Exposure to Other Claims



- Laid off employee need not sue only for unfair layoff
- Common claims by terminated employees:
 - Harassment
 - Overtime
 - Off-the-clock work
 - Meal and rest periods

Alternatives to RIFs

- Voluntary Exit Incentives
- Hiring Freeze
- Compensation Freeze
- Reduced Wages/Salaries
- Reduced Hours
- Reduced Workweeks
- Furloughs



ESD Shared-Work Program

- **Example**: A participating employee works a 40-hour workweek. If her employer reduces her hours by one day (eight hours, or 20 percent of her workweek), she is eligible for 20 percent of her unemployment benefits. Her employer would pay the remaining 32 hours at her regular rate of pay.

Wage Payment Issues



- Not making payroll
- Late payment
- Deferred compensation
- Minimum wages and overtime
- Damages and attorneys' fees
- Individual liability

Failure to Pay



- **Non-payment:** RCW 49.48.030, 49.52.050, .070
- **Late payment:** *Champagne v. Thurston County*
- **Rebates:** RCW 49.52.050, .070
- **Civil action** for amount withheld plus attorneys' fees. RCW 49.48.030.
- “Wages” broadly defined to include almost every form of **compensation**

"Willful" Wage Withholding

- "Wilfully and with intent to deprive the employee of any part of his wages"
- Double the wages owed plus attorneys' fees (Washington)
 - Additional penalties in, e.g., California
- Misdemeanor
- Individual liability



"Willful" Wage Withholding (cont.)

- Not willful:
 - Carelessness or inadvertence
 - Bona fide dispute over obligation to pay
- Inability to pay not an excuse in Washington



"Knowing Submission"



- Double damages not available where employee "knowingly submitted" to withholding
- Employees "must have deliberately and intentionally deferred to [employer] the decision of whether they would ever be paid." *Chelius v. Questar*.

Individual Liability

- Officer, vice-principal or agent can be personally liable for unpaid wages
- **Vice principals:** "he or she exercised control over the direct payment of the funds and acted pursuant to that authority"
- **Agents:** "there must be a showing that an agent had some control over the payment of wages"



Individual Liability Found

- Defendants Kingen (CEO and President, 31% owner) and Switzer (CFO and GM, 7% owner).
- Defendants “were directly involved in the payment decisions regarding employees. . . . They both had authority to determine whether or not the employees were issued paychecks and they exercised that authority before and during the bankruptcy proceedings.”
- Defendants “continued to operate the company before and after bankruptcy proceedings. They did so despite its financial difficulties. ***They made decisions about payroll, controlling payments to employees and other creditors based on their decisions about which . . . competing creditors would be paid.***”

Morgan v. Kingen, 141 Wn. App. 143 (2007)

