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**Linda D. Walton** is a member of the firm's Labor & Employment practice group and a member of the firm's Strategic Diversity Committee. In her practice, Ms. Walton defends both private sector and public sector employers in state and federal employment-related litigation matters. Ms. Walton also devotes a significant part of her practice to providing preventative counseling to employers in a variety of contexts, including day-to-day advice on a wide range of employment law compliance matters and the design and presentation of employment law training programs for managers, supervisors and human resources personnel on a variety of topics, including among others, workplace harassment, wage and hour law compliance, FMLA compliance and Title VII compliance. A frequent lecturer on the subject of employment law, Ms. Walton served for a number of years as an adjunct professor teaching Employment Discrimination Law at the Seattle University School of Law, and she has served on the faculty of both the National Institute for Trial Advocacy ("NITA"), Northwest Regional Program, and the NITA Northwest Regional Deposition Program.

**Laura M. Solis** is an associate in the firm's Labor & Employment practice. Laura's practice emphasizes employment litigation and counseling for a wide range of clients in areas such as age, race, gender, sexual orientation and disability discrimination, wage and hour issues, and employment contracts. She also counsels employers on personnel matters. She is a member of the Washington State Bar Association, the King County Bar Association and the Latina/o Bar Association. She has been a mentor for the YWCA GirlsFirst program and is currently a board member for the Laurel Rubin Farm Worker Justice Project.

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

**By Linda D. Walton and Laura M. Solis**

## PART 1—REDUCTIONS IN FORCE

### I. Introduction

According to a recent report, nearly a quarter of U.S. employers expect to institute layoffs sometime during 2009.[1] While a reduction in force (RIF) may be an effective means by which to control costs during hard economic times, an employer must plan for a RIF with numerous employment laws – including Title VII, the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), and the Worker Adjustment Retraining and Notification Act (WARN) – in mind. If an employer fails to plan a RIF with these and other federal and state employment laws in mind, the resulting litigation costs could well eliminate some or all of the cost-savings associated with the RIF.

### II. Planning a Reduction in Force

#### A. Document Review

Before embarking on a RIF it is imperative that an employer take a hard look at existing documents and policies that may have an impact on its ability to institute the RIF.

##### 1. Collective Bargaining Agreements

Generally, an employer is not required to bargain about a decision to close all or part of its business. However, an employer must bargain over the effects of that decision. This duty to bargain requires the employer to provide sufficient notice to the union so it has the opportunity to engage in meaningful discussion about the impact of the plant closing on the bargaining unit.

If a collective bargaining agreement is in place, it may contain provisions regarding plant closure or layoff. Employers are bound to honor these provisions during reductions in force. Typical provisions affecting staff reductions include severance, seniority, "bumping," and recall clauses.

[1] Watson Wyatt survey, December 2008.

### 2. Individual Employment Agreements

Even in nonunion settings, an employer may be restricted in its downsizing efforts because of contractual provisions contained in written employment contracts. By way of example, an executive level employee may have an employment contract for a specific term that extends beyond the date on which the employer would like to terminate the employee's employment as a part of a RIF. Typically, pursuant to this type of agreement the parties agree that employment may be terminated only for "cause" – and that does not include the employer's difficult economic situation. Even if the particular agreement does not contain a "for cause" provision, it may contain provisions governing salary continuation, severance pay, notice requirements, and relocation in the event of termination.

### 3. Employee Handbooks

Employee handbooks may also include specific promises of specific treatment related to continued employment. Under Washington law employees may seek damage remedies if Employers fail to keep those promises. See Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 230-231 (1984). Therefore, unless handbooks are drafted to retain discretion to the employer, an employer's failure to follow layoff and recall provisions contained in written policies may form the basis of a breach of implied contract lawsuit.

Failure to adhere to guidelines set forth in an employee handbook may also constitute evidence of the pretextual nature of an otherwise legitimate non-discriminatory reason for selecting a particular employee for layoff. In the case of Diaz v. Eagle Produce Limited Partnership, 521 F.3d 1201, 1211 (9th Cir. 2008), the Ninth Circuit Court of Appeals considered the claims of four farm workers laid off during a seasonal slowdown in production. Three of the plaintiffs were members of a tractor crew. The supervisor who selected the plaintiffs for lay off testified that:

> [H]e did not consider the extent of the employee's experience with a tractor, how many years the employee had been working [for the employer], or the employee's age or wage. [He] did, however, consider job performance, attitude, attendance, work ethic, and the individual's ability to work with others.

521 F.3d 1201, 1205.

The Court found that the supervisor's failure to consider the length of the plaintiffs' employment the defendant employer prior to laying them off violated the employer's company handbook, which required him to consider "skill, ability, attendance, production records, and the length of service. The Court held that reasonable jurors could conclude that this "irregularity" undermined the credibility of the proffered reasons for the layoff:

> [I]f age was truly irrelevant to [the supervisor's] decisionmaking, he presumably would not have failed to weigh the factor in the handbook that weighed most heavily in favor of retaining

> older workers. The evidence is consistent with the view that [the supervisor] disregarded company policy because it conflicted with his intent to discriminate.

Id. at 1214.

## B. The Selection Process: Justifying the Decision

### 1. EEO Compliance

Judges and jurors understand economic layoffs. Today, anyone who can read a newspaper or a website or turn on a television is deluged with information about the impact the global economic downturn has had on U.S. employers.[2] Consequently, potential liability lies not in the decision to lay off employees, but in the decision as to whom to lay off.

Federal, state and local laws prohibit employers from discriminating against employees on the basis of race, sex, national origin, religion, age and disabling condition. Washington state law also prohibits employment discrimination on the basis of sexual orientation and marital status. The essence of the disparate treatment claim is the statutory prohibition against treating an applicant or employee less favorably because of that individual's race, sex, national origin, religion, age, marital status, sexual orientation or disabling condition. Just as a manager may treat an employee less favorably by subjecting that employee to poor work conditions or harsher disciplinary actions, a manager may treat an employee less favorably when he or she determines whom to lay off during times of economic downturn.

Any time an employer institutes a widespread reduction in force, it may be subject to a variety of employment discrimination lawsuits. Of all the types of discrimination claims that may be raised, an age discrimination claim is the most likely because reductions in force often have a disproportionate impact on older employees. Depending on the composition of the group of employees laid off, however, discrimination claims based on sex, race, national origin, sexual orientation, disability, or marital status also may be raised.

In two recent decisions, the Ninth Circuit Court of Appeals held that "to suffice under McDonnell Douglas, an employer's explanation must explain why the plaintiff "in particular" was laid off." Diaz v. Eagle Produce Limited Partnership, 531 F.3d at 1211 (citing Davis v. Team Elec. Co., 520 F.3d 1080 (9th Cir. 2008)).[3] In both Diaz and Davis

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[2] On Friday March 6, 2009, the U.S. Bureau of Labor Statistics announced that private sector employment in the U.S. decreased by 697,000 during the month of February 2009.

[3] As in any other claim of disparate treatment based upon the plaintiff's membership in a protected class, a plaintiff may seek to prove that he or she was selected for layoff for unlawful reasons through the introduction of direct or circumstantial evidence. Under the three-stage burden-shifting framework laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) framework, the employee must first establish a prima facie case of age discrimination. *Coleman v. Quaker Oats Co.*, 232 F.3d

the Ninth Circuit made it clear that where an employer produces no evidence as to why a plaintiff "in particular" is laid off during the course of a RIF the employer has failed to articulate a legitimate, nondiscriminatory or nonretaliatory reason for the plaintiff's layoff. In Davis the court held:

> It is not enough for an employer to simply state that it decided to lay off a group of workers. To meet its burden, the employer must explain why it selected the plaintiff in particular for the layoff. To impose a lesser standard would allow an employer with only the slightest amount of guile to get away with retaliation simply by laying off a victim of discrimination at the same time it laid off other workers for legitimate reasons.

520 F.3d at 1094.

Most discrimination cases arising out of reductions in force will be tried based on the pretext prong of the three-part test. To succeed on this ground, a plaintiff must undermine the employer's expressed reasons for the reduction in force and the selection of the complaining employee.

Many plaintiffs attempt to prove pretext by relying on a statistical analysis of the composition of employees laid off in the reduction in force. Although statistics alone cannot generally support a finding of discrimination during a reduction in force, statistics may be given significant weight if overwhelming disproportionate disparities are demonstrated. In any case, statistics are relevant and admissible to support claims that discrimination occurred. Other pretext evidence may include testimony establishing that the terminated protected-class employee has better performance records or qualifications for remaining jobs than retained employees not in the protected class or testimony regarding statements made by the decision-makers that suggest a discriminatory animus. See Diaz, 521 F.3d at 1210 (holding "reasonable jurors could find [supervisor's] decision not to lay off several substantially younger workers with less experience than [the plaintiffs] . . . supports an inference of discrimination) and Duval v. Callaway Golf Ball Operations, Inc., 501 F. Supp. 2d 254 (D. Mass. 2007) (holding genuine issue of material fact existed as to whether proffered reason to terminate employee as part of reduction in force was pretext for age-based animus, arising from company president's remarks to public forum about presentation of younger faces and comments of supervisor who targeted employee for layoff and who negatively spoke about “dead weight” of people who had been with company for long time, thus precluding summary judgment in age discrimination case).

It is crucial to avoid even the appearance of inappropriate decisionmaking. Layoffs are always a period of *heightened litigation exposure*. Everyone involved

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1271, 1281 (9th Cir. 2000). If the employee has justified a presumption of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse employment action. *Id.* If the employer satisfies its burden, the employee must then prove that the reason advanced by the employer constitutes mere pretext for unlawful discrimination. *Id.*

should be cautious in all of their oral, written and e-mail communications to avoid stray comments that could be taken out of context to suggest inappropriate decisionmaking. See Holmes v. Marriott Corp., 831 F. Supp. 691, 707-08 (S.D. Iowa 1993) (holding that statements concerning the plaintiff's age made by the plaintiff's immediate supervisor, who was not the final decisionmaker, were not stray remarks, but instead were probative evidence establishing discriminatory intent).

### 2. FMLA Compliance

The Family and Medical Leave Act ("FMLA") differs from the federal and state anti-discrimination statutes mentioned above in that it is not only proscriptive in nature (it prohibits employers from retaliating against employees for exercising their rights under the statute), it is prescriptive in nature. That means that the FMLA grants eligible employees certain substantive rights, including the right at the end of an approved FMLA leave to be restored to the same position the employee held when he or she began the leave or to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment. See 29 U.S.C. § 2614(a); 29 C.F.R. § 825.216 (2006). But what happens when, during an employee's approved FMLA leave the employer needs to institute a reduction in force ("RIF")?

*No Greater Right of Reinstatement*

As a threshold matter, an employee on FMLA leave has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. Consequently, an employer need not reinstate an employee who would have lost her job even if she had not taken FMLA leave. 29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.216 (2006).

According to the U.S. Department of Labor (the "DOL") FMLA regulations, if an employer can prove that it would have laid off an employee during the time the employee was on FMLA leave, the employee is not entitled to restoration of her job. 29 C.F.R. § 825.216(a)(1) (2006). The DOL regulations provide the following example: "If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee [to the position she held when she began the leave] cease at the time the employee is laid off, *provided* the employer has no continuing obligations under a collective bargaining agreement or otherwise." Id. (emphasis added).

*Who Has the Burden of Proof?*

Employers should note that the DOL takes the position that it is the employer who bears the burden of proving that an employee would have been laid off during the FMLA leave period and is, therefore, not entitled to restoration. Id. Relying upon the DOL's interpretation of the FMLA, three circuit courts of appeals (the Eighth, the Tenth and the Eleventh) have held that when an employer does not restore an employee to her job or an equivalent one, the *burden is on the employer* to prove the employee

would not have remained employed even in the absence of her FMLA leave. The Sixth Circuit Court of Appeals and the Seventh Circuit Court of Appeals have disagreed with the DOL, holding that the regulations are not intended to shift the burden of proof from the general rule that the *plaintiff bears the burden of proof* of a violation of the FMLA. See Throneberry v. McGehee Desha County Hosp., 403 F.3d 972 (8th Cir. 2005), Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955 (10th Cir. 2002), and O'Connor v. PCA Family Health Plan Inc., 200 F.3d 1349 (11th Cir. 2000).

*What Constitutes Evidence That an Employee on Leave Would or Would Not Have Been Laid Off During a RIF?*

The question of whether the employer bears the burden of proving that an employee would have been laid off during the FMLA leave period or the employee bears the burden of proving she would not have been laid off during the FMLA leave period will likely be resolved by the United States Supreme Court some time in the future. In the meantime, lower court decisions provide employers with some idea of the type of evidence courts have found persuasive.

In the case of Peterson v. Tri-Country Metropolitan Transportation District of Oregon, 2008 WL 723521 (D. Or. Mar. 14, 2008), the court held that the employer failed to demonstrate that plaintiff was not entitled to return to her job due to a legitimate reduction in force. The court found that the record contained sufficient evidence to support the plaintiff's theory that the potential elimination of her position arose only after she suggested that she planned to seek a leave due to job-related stress. The record contained evidence that after the plaintiff announced her intent to seek leave for job-related stress, her supervisor (1) told her that he was angry that she had filed such a claim, (2) made critical comments on her annual performance review, and (3) inquired into whether the plaintiff's position could be eliminated. The court denied the employer's motion for summary judgment, noting, among other things, that the employer had a "gaping hole" in its documentary trail regarding the decision to eliminate the plaintiff's position. Id.

In Persky v. Cendant Corp., 547 F. Supp. 2d 152 (D. Conn. 2008), the plaintiff sued her employer claiming a violation of the FMLA after the employer eliminated her position while she was on maternity leave. The employer produced evidence that the plaintiff was laid off after another company acquired the unit of the employer's business that the plaintiff had managed; and that 300 employees were laid off as a result of the acquisition. The court, nevertheless, found that the employer violated the FMLA and awarded the plaintiff liquidated damages in the amount of $496,344.

The record contained evidence that the transition agreement between the plaintiff's employer and the acquiring company specified a handful of employees to stay on as part of a transition team, including the employee serving as a "placeholder" for the plaintiff during her leave. While on maternity leave the plaintiff was informed of the sale of her unit and she was told that her job had been eliminated. The plaintiff was also told that the "placeholder" employee would be fulfilling the employer's obligations to the acquiring company for ten more months. The employer offered the plaintiff the

opportunity to apply for several positions within its new management structure, but no specific replacement position was ever explicitly offered to her. The court found the employer's argument that the plaintiff was terminated during her leave because of companywide changes or a reduction in force unavailing, at least in part, because the plaintiff's "placeholder" was retained pursuant to an express provision in the employer's transition agreement with the acquiring company.

On the other hand, in Williams v. Sterling Healthcare Services, Inc., 2006 WL 2254776, 11 Wage & Hour Cas. 2d 1278 (BNA) (5th Cir. Aug. 7, 2006), the Fifth Circuit Court of Appeals ruled in favor of an employer alleged to have interfered with an employee's FMLA rights by eliminating the employee's position while she was on maternity leave. In Williams, the plaintiff's employer was a wholly owned subsidiary of a larger company that had a long-standing practice of eliminating redundant jobs and transferring management functions to its regional offices. The plaintiff began working as an accountant for the subsidiary in August 2000, after the larger company acquired it, and within two and a half years the parent company had eliminated all on-site accountant positions in its Southern region, except for the plaintiff's.

## C. Establishing Valid Selection Methodology and Criteria

### 1. Functional Review

In making RIF decisions, the employer should start with a focus on positions to be eliminated, not individuals. Unless the employer is simply reducing head count within continuing job positions, focusing the analysis on positions to be eliminated inevitably makes the decision more objective and understandable and less vulnerable to second guessing. This process usually includes a study of job functions without regard to the individuals currently performing the job. Factors typically studied include types of duties performed, time spent on performance and overlaps among jobs. When considering cost as a factor, the employer should be wary of the potential adverse impact of eliminating higher-paid positions of older employees.

Once the positions to be eliminated, consolidated or reduced are selected, the employer should generate a list of positions that could potentially be affected by the RIF. To the extent that they do not already exist, job descriptions should be prepared for remaining positions and for any new positions created as a result of restructuring. These job descriptions can be a valuable tool in evaluating individual employees in connection with the RIF.

### 2. Evaluation of Individual Employees

Once the positions remaining after the RIF have been identified, the employer must determine which individual employees will be retained to fill the remaining jobs. To the extent that certain positions are eliminated entirely, this process does not have to take place. However, where positions are consolidated, new positions are created, or a reduced number of specific positions will remain after the RIF, employees must be evaluated with respect to their qualifications to fill these positions.

Senior management should be involved in the employee selection process and should ensure that decisions are made in a consistent manner. Input from lower-level managers who have direct contact with the employees being considered may be necessary. Generally, the use of objective criteria, such as seniority or eliminating certain job categories, locations or departments completely, make employee selection decisions easier to explain and defend. However, employers often choose to use subjective criteria, such as performance or overall contributions to the company, to select employees for inclusion in the RIF in order to ensure that the smaller group of employees who remain after the RIF are the strongest performers and the most likely to contribute to the success of the company in the future. Decisions based on subjective criteria are more difficult to defend because employees may claim the decisions were based on forbidden factors, such as race, sex or age.

Prior to implementing a RIF where employee selection is based on performance or other subjective criteria, the employer should confirm that it has adequate personnel documentation to support the decisions. The employer should confirm that employee evaluations used in the process are in writing, current and as objective as possible. Past performance evaluations often do not contain the type of consistent, current and critical information regarding employees that will be necessary to defend the selection of one employee over another.

Senior management and/or human resources personnel should be involved in preparing the selection criteria and in making or reviewing the employee selection decisions. The team selecting employees should be diverse, if possible. Where employee selections are made or reviewed by a team comprised of individuals of different races, sexes and ages, the risk of perceived discrimination, as well as employment discrimination charges, should be reduced. And, certainly, all decision makers should receive the selection criteria in *writing* and should receive training on how to apply the criteria fairly.

### 3. Review of the Proposed RIF

Once the jobs affected by the proposed RIF have been determined, two levels of review are critical, a business review and an adverse impact review.

*Business Review*

During the business review, the proposed RIF is evaluated with respect to the likelihood that the business goals motivating the RIF will be met by the proposed changes. The employer asks the following types of questions about the proposed RIF:

- Do these cuts make sense?
- Are they defensible?
- Have personality, subjectivity or other intangible elements infected the decisionmaking?

- Can the decisions withstand harsh scrutiny?

- Can the company defend its choice of the positions being eliminated when compared to those that are not?

Conducting this sort of review is important for two reasons. First, it provides an independent check on decisionmaking that may have been influenced by personal feelings, favoritism, or other improper factors. Second, it helps ensure that the decisionmaking has been carefully thought through at every level and can be defended, if need be, in subsequent litigation. Best approach? Designate an independent group of managers, not involved in the initial planning, to review the proposed cuts.

The business review of the RIF usually is not covered by attorney-client or work product privilege at this point. Accordingly, there should be no discussion of discrimination issues during this phase of the review.

*Adverse Impact Review*

After the proposed RIF has been reviewed from a business perspective—and *before* final selection decisions are made—an adverse impact review should be conducted with the assistance of human resources personnel and legal counsel on a privileged basis at the direction of senior management. This review will focus on whether the decisions of the employer with respect to the RIF could be found to be discriminatory in either of two ways: (1) intentional discrimination (the forbidden factors discussed above impacted the RIF decisions) or (2) adverse impact. It is critical that counsel be engaged and involved in the planning and execution of any such review to ensure that the analysis is protected by the attorney-client privilege and not subject to discovery if litigation follows.

The purpose of reviewing RIF decisions for adverse impact is to determine whether facially neutral decisionmaking criteria are resulting in a disproportionate impact on protected employees. Depending on the complexity of the analysis, this review may involve expert statisticians to control variables.

In order to conduct an adverse impact review, the employer must analyze the current (pre-RIF) workforce in terms of protected groups. These should include race, sex and age, and any other protected group under applicable federal, state and local statutes of which there are members within the workforce. The analysis of the adverse impact of the RIF on older employees is especially complex. Studies of age groups should begin with studies of affected employees under 40 and over 40, but also should cover groups of smaller age brackets, or “bands,” over 40. This is necessary because the employer may be liable for age discrimination even if a large number of employees over 40 are retained after the RIF if a disproportionate number of employees significantly over 40 are terminated in the RIF.

Counsel will likely evaluate the proposed RIF using one of several statistical tools developed to measure the effect of a proposed layoff. First, the “80% Rule” is a tool

frequently used by the Equal Employment Opportunity Commission (EEOC) to measure the proportion of adversely affected protected employees as compared to the proportion of adversely affected unprotected employees. A second, more precise tool is the use of a standard deviation analysis. In complex or large-scale RIFs, an expert statistician may be employed to conduct more sophisticated analysis.

By performing a preliminary statistical analysis prior to the RIF, the employer has the opportunity to modify the procedure for identifying the at-risk pool of employees and/or the employees terminated in the RIF, if necessary.

If the adverse impact review indicates that the RIF may have a disproportionate impact on protected groups, the employer should consider making adjustments to the RIF procedures to avoid creating any inference of discrimination against members of protected groups. However, the employer may have a legitimate reason for using the criteria despite the fact that the statistical disparity between the effect of the RIF on protected group members and nonprotected group members appears to be significant.

When analyzing statistical evidence with respect to discrimination claims, the court will consider other pertinent variables in addition to protected status. Some protected classes of employees may have statistically higher selection rates that are justified by other factors. Factors such as education and experience with a particular product or process may diminish any statistical disparity and reduce the probative value of statistical evidence that does not consider these factors. See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000) (statistical disparity between the effect of a RIF on older and younger workers was not relevant because it did not take into account any variables other than age), cert. denied, 121 S. Ct. 2592 (2001). Small sample sizes may also render statistical analysis unreliable.

Taking time to really think through the selection methodology and criteria in advance of a layoff pays off in the long run, as illustrated in the case of Evers v. Alliant Techsystems, Inc., 241 F.3d 948 (8th Cir. 2001). In Evers, the Eighth Circuit Court of Appeals affirmed summary judgment for the employer, where Alliant's documented selection process resulted in the termination of the plaintiffs' employment as part of a reduction in force. Alliant's Workforce Reduction Criteria contained the following five express criteria: (1) performance rating, (2) performance ranking, (3) critical skills, (4) cross-functional capabilities, and (5) leadership. The plaintiffs brought their ADEA claims under both a disparate impact and disparate treatment theory. As part of their disparate impact case, plaintiffs challenged the employer's (1) layoff guidelines and ranking process, (2) budgeting process, and (3) overall reduction in force. The plaintiffs were unable to produce evidence that use of the ranking process resulted in a disparate impact on older employees. There was no evidence that the budgeting process resulted in the layoff of older, more highly paid employees. In fact, the evidence demonstrated that the average salaries of those who were retained were higher than the average salaries of those who were laid off.

## D. WARN Act Compliance

### 1. Advance Notice

In every large-scale layoff, employers with more than 100 employees, excluding part-time employees, must consider whether the Worker Adjustment and Retraining Notification (WARN) Act applies. WARN generally requires employers to provide 60 calendar days' advance notice of plant closings and mass layoffs.

*Covered Employers*

- "Business Enterprises" with more than 100 full-time employees or more than 100 employees who aggregate at least 4,000 hours/week (not including employees who have worked less than six months in the last 12 months or those that work an average of less than 20 hours per week).

- Includes nonprofit organizations, hospitals, public utilities and educational institutions, in addition to private businesses.

*The Trigger*

The WARN Act's 60-day notice requirement is triggered by any of the following:

- A "plant closing," defined as the permanent or temporary shutdown of a single site or a unit within the site causing 50 or more employees to have an employment loss during any 30-day period (in many cases this can be extended to 90 days). "Employment loss" is further defined to mean a layoff exceeding six months or a 50 percent reduction in hours during each month of any six-month period. 29 U.S.C. § 2101.

- A "mass layoff," defined as an "employment loss" at a single site over a 30-day period by 500 employees or by 50 or more employees constituting 33 percent or more of the workforce at that site. Id.

Once triggered, the WARN Act requires that notice be sent to a collective bargaining agent or, if there is no collective bargaining representative, all "affected employees," defined to include all employees, including white collar and managerial employees, who are likely to lose their employment as a consequence of a proposed plant closing or mass layoff. Notice must also be sent to the state dislocated worker unit and chief elected official of the "unit of local government" within which the layoff occurs so that assistance may be provided to the affected employees if necessary.

In calculating employment losses under the WARN Act, the employer does not need to count discharges for cause, voluntary quits, retirements, certain part-time employees, or employees offered a transfer to another location within a reasonable commuting distance.

**Caveat**: Scattering the layoffs over several weeks will not insulate an employer from liability under the WARN Act. Under several different legal theories, all losses within a 90-day period, in many circumstances, may be aggregated toward a single layoff.

*Content of the Notice*

The WARN Act contains detailed requirements for the contents of the notice that must be sent. 20 C.F.R. § 639.7. Generally, the notice must be tailored to specific affected employees, including a timetable for their anticipated layoff. The contents of each of these notices is detailed in the regulations enacting the WARN Act. A comprehensive guide for employers is provided at http://www.doleta.gov/layoff/pdf/EmployerWARN09_2003.pdf.

**2. Exemptions From the Law**

- Layoffs and plant closings caused by the completion of a project, where employees were hired with the specific understanding that their jobs were tied to the project, do not require WARN notice.

- A bona fide strike or lockout does not constitute a plant closing or mass layoff.

**3. Exceptions to the Advance Notice Requirement**

There are some exceptions to the WARN Act's *advance* notice requirement:

- Where an employer suffers an unforeseen business circumstance, it may give notice as soon as the plant closing or mass layoff becomes reasonably foreseeable.

- A faltering (economically unstable) company seeking additional capital does not need to provide advance WARN notice if such notice would hinder its ability to obtain new capital. Under the DOL's interpretive regulations, this exception applies to plant closings only, not mass layoffs.

- Layoffs or plant closings caused by natural disaster are not subject to the advance notice requirement.

- Layoffs and plant closings caused by relocation or consolidation do not require advance notice if the affected employees are offered a transfer to a new site within a reasonable commuting distance.

29 U.S.C. §§ 2101-2103.

*The Faltering Company Exception*

In an economy such as the current one, many employers may assume that they can, as "faltering" companies, escape the need to provide employees with 60 days

advance notice of layoff. However, courts have held that the faltering company exception is to be applied narrowly. In order to qualify for the faltering company exception an employer must be able to show that:

> (1) the employer was actively seeking capital at the time that sixty-day notice would have been required; (2) there was a realistic opportunity to obtain the financing sought; (3) the financing would have been sufficient, if obtained, to enable the employer to keep the facility open for a reasonable period of time; and . . . (4) The employer reasonably and in good faith . . . believed that giving the required notice would have precluded the employer from obtaining the needed capital or business. The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given, that is, if the employees, customers, or the public were aware that the facility, operating unit, or site might have to close. This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs.

Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1009 (9th Cir. 2004) (citing to 20 C.F.R. § 639.9 (a)(4)). In the case of Childress, the defendant employer sought to qualify for the faltering company exception, arguing that it was in the process of seeking a line of credit from a bank. Affirming the district court's ruling that the employer failed to meet the requirements of the faltering company exception, the Ninth Circuit Court of Appeals held:

> [E]ven assuming that there was a realistic opportunity to obtain such financing, and that the financing, if obtained, would have enabled them to avoid or postpone the closure of the mill, appellants provided no evidence that they reasonably and in good faith believed that giving the sixty-day notice to their employees during the negotiations with U.S. Bank would have precluded them from obtaining the credit from the bank.

Id.

*Unforeseen Business Circumstances*

The DLL regulations amplifying the WARN Act provide guidance on what type of business circumstances will be considered "not reasonably foreseeable" for purposes of meeting the unforeseen business circumstance exception's requirements. The regulations provide:

> (1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major

> economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice may be an unforeseeable business circumstance.
>
> (2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

20 C.F.R. § 639.9(b)(1)-(2).

In the Childress case the employer pointed to the decision by its bank on September 7, 1998, refusing to rewrite its credit, as the sudden and unforeseeable event that caused the shutdown of its operations. Citing to the employer's response to a discovery request, the Ninth Circuit found that the shutdown of the employer's lumber mill was caused by a variety of factors which accumulated over time, thus making the closure foreseeable.[4]

On the other hand, in the case of the Teamsters, International Brotherhood of Local 952 v. American Delivery Service Co., 50 F.3d 770 (9th Cir. 1995), the Ninth Circuit held that the "business circumstance exception" could apply when a parent corporation canceled a contract with is subsidiary with fewer than 60 days notice, provided that the parent and its subsidiary were separate employers. The Court further held that there was no duty to require 60 days advance notice of cancellation provision in contracts.

In Bradley v. Sequoyah Fuels Corp, 847 F. Supp. 863 (E.D. Okla. 1994), the district court held that a sudden and unexpected release of nitrogen dioxide from a uranium processing plant caused the plant closure and that the release was sufficient to trigger the "business circumstances exception." Accordingly, the employer, who had complied with the Act by promptly notifying the "affected employees" regarding their effective termination, was relieved from any liability to the employees under the WARN Act for failure to provide a sixty-days notice.

---

[4] The defendant employer stated in its discovery response the following:

> The closure of the plant and layoffs in September 1998 was occasioned by losses to the company which could not be sustained any longer. These losses were a function of the depressed lumber market, increased cost of raw materials, operational difficulty in the startup of a new planer, and factors effected by the price of raw materials and finished goods beyond the control of Darby Lumber, Inc. In turn, raw materials and finished goods markets and prices were effected by the general economic downturn in Pacific rim countries, influences by NAFTA, and significantly influenced by environmental pressure to halt sales of forest service timber.

Childress, 357 F.3d at 1008.

**Caveat**: Even where employers are relieved of the responsibility to provide advance notice, they may still need to comply with the WARN Act's notice requirement as soon as layoffs or plant closures are foreseeable.

*Ignorance of the Law Won't Work*

The WARN Act also includes a "good faith" exception. The Act provides:

> If an employer which has violated this Act proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

29 U.S.C. § 2104(a)(4).

As noted in the Childress case,0 "good faith" under the WARN Act is an affirmative defense as to which the defendant employer has the burden of proof. The Ninth Circuit accepted with approval of the district court's reasoning that "[u]nder the good faith exception, the employer must establish that it had 'an honest intention to ascertain and follow the dictates of the [statute]" and that it had reasonable grounds for believing that [its] conduct complie[d] with the [statute].'" Childress, 357 F.3d at 1007 (citing Local 246 Utilities Workers Union of Am. v. So. Cal. Edison Co., 83 F.3d 292, 298 (9th Cir. 1996)).

Affirming the district court's ruling in favor of the plaintiff's employees, the Ninth Circuit held that:

> Appellants failed to provide facts to establish that they had an honest intention to ascertain and follow the dictates of the WARN Act or that they had reasonable grounds for believing that their conduct complied with it. Appellants did provide evidence that they had little or no knowledge of the Act and that Russell did not want to close the DLI mill. That information tends to show that defendants were ignorant of the WARN Act; it does not, however, show that they had an honest intention to follow it, or that they had grounds for believing that they were in compliance with it. Mere ignorance of the WARN Act is not enough to establish the good faith exception. The district court was correct in finding that the good faith exception to the WARN Act did not apply.

Id. at 1008 (emphasis added).

**4. Damages and Penalties**

Failure to comply with the WARN Act can result in private actions and may result in an employer being ordered to pay full pay and benefits to each affected employee for a period of up to 60 days, as well as civil penalties of $500 per day for up to 60 days,

payable to the U.S. Treasury, where the employer does not comply with the requirements that it notify state and local governments. 29 U.S.C. § 2104.

**Note**: Employers should note that in the Childress case the Ninth Circuit affirmed the district court's award of attorney's fees in an amount of more than twice the plaintiffs' total recovery.

### 5. The Future? – The FOREWARN Act

During the 110th Congress (2007-2008) legislation was introduced in both the House and Senate seeking to strengthen the requirements of the WARN Act. The Forewarn Act of 2007 died in committee. Had the legislation passed, it would have applied WARN to employers of **50 or more employees** rather than 100 employees. It also would have required employers to provide employees and certain governmental officials with **90 days** written notice of plant closings or mass layoffs rather than 60 days notice. The legislation also defined a "plant closing" to include a shut down affecting **25 workers**. The legislation increased the penalties under the WARN Act to require an employer to pay two days' pay for each calendar day the employer was short of the required notice rather than one day's pay.

Although the legislation did not pass out of the 110th Congress, it should be noted that one of its co-sponsors was then Senator, now President Barack Obama.

### 6. Mini-WARN Acts

A growing number of states, including California, Wisconsin, Illinois, and New York (new law effective February 1, 2009), have their own notice laws with lower thresholds. For example, under the California WARN Act, a "covered establishment" is defined as "any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, **75 or more persons**." Labor Code § 1400(a) (emphasis added).

## III. Executing a Reduction in Force

## A. Communications Strategy

The employer should consider both its external and internal communications strategy prior to implementing the RIF. External communications are critical to preserve

- Marketplace confidence,
- Investor confidence, and
- Public relations.

Internal communications are critical to avoid

- Impact on workforce morale,

- Exacerbating hurt feelings of affected employees, and
- Maintaining single clear message to explain decisions.

The employer should define the message it wants to send to explain the layoffs and make sure everyone stays with that message. As the layoff is implemented, emotions are likely to run high and, in some cases, press interest may become intense. Planning the message beforehand is essential. It also is important to identify a principal spokesperson to articulate the message and to have communications regarding the RIF go through that spokesperson to ensure consistency and accuracy.

**Practice Tip**:
- Draft an information sheet for managers and supervisors covering the reasons for the reduction in force and generally describing the overall numbers of people and functional areas affected.
- Draft a confidential question-and-answer format with preplanned answers to anticipated questions. Anticipate the toughest questions.
- Develop a benefits summary and designate a central source for benefits questions.

## B. Layoff Meetings

### 1. Plan Each Meeting Before It Begins

Meetings regarding the RIF should be planned ahead of time to ensure that they are consistent and that all necessary topics are covered. The person selected to run the meeting should carefully review a checklist of topics to cover and ensure that he or she is familiar with the issues, including the employees' unique situations and the equipment and/or benefits issues that might arise.

**Practice Tip**: Train managers about what not to say--stray remarks that are misconstrued are a frequent source of pretext evidence. Discourage managers from deviating from the prepared script. Discourage lower level managers and supervisors without access to the entire decisionmaking process from speculating.

### 2. During the Meeting

*Conduct Meetings in Person With Human Resources Personnel and Manager in Attendance*

Meetings regarding the RIF should be conducted in person with human resources personnel and the manager of the employee affected in attendance. One person should be designated to run the meetings. This person should stick to the checklist and script to the maximum extent possible. Affected employees should be treated with dignity and respect; but the meetings should not be allowed to last any longer than necessary. Listening is crucial to this process. The person running the meetings should listen carefully to employee concerns or comments and should document any statements.

*Meetings Should Begin With an Explanation of the Reasons for the RIF*

Each meeting should begin with an explanation of the reasons for company restructuring or downsizing and should inform the employee at the outset that his or her position has been eliminated and the termination date of his or her employment. Ambiguity does not make this easier; the explanation should be clear and to the point. It should be explained that he or she is one of many employees being laid off during this process, but information about other affected employees (who may not yet know) should not be provided.

*Make It Clear That the Decision Is Final*

The company should impress upon the employee the finality of the decision. The employer should not suggest or encourage false hopes that other positions may be located or that the employee can otherwise avoid lay off. It should be explained that his or her skills and experience have already been considered for possible redeployment, and no such positions were found. Unless recall rights are provided (in which case they should be defined), it should also be made clear that the company does not provide for "recall rights," but the employee is welcome to reapply for any open positions with the company in the future.

*Do Not Debate the Layoff Decision*

The management representatives should not engage in any debate with the employee regarding the company's decision. Employees are likely to be upset, and the employer can never "win" such a debate. The person running the meeting should explain the fact of the layoff with as much compassion as possible and listen carefully to what the employee has to say.

*Advise Employees of Their Benefits Rights*

Employees should be advised of the benefits rights to which they are entitled regardless of any severance agreement. For example:

- On payroll through what date?
- Company paid health and insurance benefits will continue through what date?
- Signing bonuses will or will not have to be repaid to the company (a common area of concern in Internet companies)?
- Outplacement services will or will not be available?

- Right to continue health care coverage under COBRA and the procedure to invoke those rights.[5]

- Life insurance policies and the right, if any, to convert such policies to individual policies.

- Provide information on web-based or brick and mortar employment agencies to assist in employees' job search.

*Provide Information on Unemployment Compensation*

Provide employees with information on how to apply for unemployment benefits, including phone numbers to call and forms to complete. Title 50 RCW allows an employee to collect benefits when he or she becomes unemployed through no fault of his or her own. Employees who are terminated as part of a RIF generally will be eligible for unemployment compensation.

The Washington Employment Security Department has information on unemployment insurance benefits, including how to file a claim for benefits over the Internet or by phone, at: http://www.wa.gov/esd/ui.htm.

*Arrange for the Return of Company Property*

The employer should obtain the return of any company property in the employee's possession. Before the termination meeting begins, the person conducting the meeting should have a complete list of such items, know whether the employee is or is not purchasing any such equipment through payroll deductions and, if so, confirm whether there is a written agreement to deduct the remaining amounts due from the final paycheck. If not, this issue should be discussed with the employee, and arrangements should be made as to how the employee intends to pay for any company property.

The types of items that often need to be collected from employees include:

- Laptops

- Cell phones

- Pagers, Blackberry devices

[5] The American Recovery and Reinvestment Act of 2009 (the "Stimulus Bill") expanded eligibility for COBRA and provides a premium reduction to certain qualified individuals. Individuals eligible for COBRA coverage who were involuntarily terminated by their employer on or after September 1, 2008 through December 31, 2009, who are eligible for COBRA and elect COBRA, may be eligible to pay a reduced premium amount that is only 35% of the premium costs for COBRA coverage. See Appendix B for further explanation and practice tips.

- Palm pilots, etc.
- Company equipment at the employee's home
- Keys
- Identification and security access cards
- Company credit cards
- Company telephone cards
- Confidential proprietary information, documents, software programs, etc., in the employee's possession
- Company cars

Management representatives should coordinate with systems managers to consider the need to void the passwords or other codes to company systems of employees affected by the RIF at or just after the time of the termination meeting. Management should also consider the threat of potential acts of vandalism or other security issues and whether the e-mail and ISP accounts of terminated employees should be promptly cancelled. In any event, the employer should consider whether to allow employees access to archive or forward personal e-mail stored on the company system. Any applicable employee discount arrangements should be terminated. In addition, arrangements should be made for the return of any company-licensed software that may reside on employees' home computers.

## C. Public Sector Pre-Termination Hearings?

Under the federal constitution, a public employee having a "property" or "liberty" interest in his or her employment is entitled to some sort of "due process" prior to involuntary termination. Liberty interests are uncommon in public employment.[6] Property rights in public employment are more common. A public employee who has a reasonable expectation of continued or permanent employment has a property interest in such employment. Examples in Washington include teachers who are employed beyond their provisional year, many school district classified employees, persons employed by cities and counties under civil service laws and many others.

The minimum process due to a public employee having a liberty or property interest was considered by the United States Supreme Court in Cleveland Board of

[6] A liberty interest may be violated if the employer makes public charges against the employee that are stigmatizing and might seriously damage his or her reputation in the community, such as charges of dishonesty or immorality. As a result, public employers should carefully consider what information to make public about an investigation and subsequent personnel action.

Education v. Loudermill, 470 U.S. 532 (1985). Loudermill held that a civil service employee who could be terminated only for cause was entitled to a pretermination hearing prior to discharge. In Loudermill the Supreme Court held that the purpose of the pretermination hearing is to determine whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

Courts in some jurisdictions distinguish layoffs from “for cause” terminations and hold that layoffs do not give rise to Loudermill pretermination hearing rights. For example, a district court in the Northern District of Mississippi, in Franks v. Magnolia Hospital, 888 F. Supp. 1310 (N.D. Miss. 1995), aff'd, 77 F.3d 498 (5th Cir. 1996), held that an employee who was laid off as part of a hospital-wide reduction in force was not entitled to a pretermination hearing. The court reasoned that while for cause terminations carry "a stigmatization which might impair a person's ability to secure future employment," layoffs do not injure an employee's future job prospects and do not reflect on an employee's job performance. The court further reasoned that "meaningful due process hearings would often be impractical due to the large number of employees being laid-off." Similarly, the court in Mayfield v. Kelly, 801 F. Supp. 795 (D.D.C. 1992) found that the balance of the Loudermill factors weighed against pretermination hearings in layoffs because reductions in force do not involve the stigma that results from for cause dismissals and affect a large number of employees "for whom it is impossible to have pre-termination hearings."

The Ninth Circuit recently departed from this line of reasoning when it affirmed the pretermination rights of a City employee who was laid off in Levine v. City of Alameda, 525 F.3d 903 (9th Cir. 2008). City employee Edward Levine requested a pretermination hearing after being notified of his impending layoff. The City denied his request on the basis that his discharge was not for cause. The Ninth Circuit held that the City violated Levine’s due process rights when it did not allow him to present his side of the case before he was laid off and that the district court had not erred in giving Levine a *full evidentiary hearing* before a neutral third party as a remedy for the violation.

Levine did not discuss whether its ruling applies to larger reductions in force, but at least one court has suggested that a right to a pretermination hearing in a layoff may depend on how many employees are laid off and further recognized an employee’s interest in challenging the layoff decision because of the significant stakes involved. In that case, Kiser v. Naperville Community Unit, 227 F. Supp. 2d 954 (N.D. Ill. 2002), the court refused to dismiss a laid off employee's due process claim against his employer for failing to grant a pretermination hearing. The court distinguished the cases holding that layoffs did not give rise to pretermination rights, because here the employee was the only person laid off and he had "substantial personal interests at stake in losing his job and benefits so close to his planned retirement."

## D. Obtaining Releases

### 1. Severance Packages

Employers that decide to offer employees terminated in a RIF severance packages—other than severance paid pursuant to a preexisting severance agreement or plan—often request releases from employees in exchange for the benefits of the severance package.

### 2. Advise Employees of Severance Benefits Available Under the Severance Agreement and Release

If a severance package is to be offered, the employer should advise employees of the severance benefits available upon the signing of a severance agreement and release. Such severance benefits may include:

- Additional pay
- Cash payment of a defined amount
- Outplacement or extended outplacement benefits
- Other benefits

### 3. Present the Severance Agreement and Release and Ask Employees to Review It

The employer should present employees eligible for the severance package with the severance agreement and release and ask them to review it. The employer should emphasize that this is a voluntary choice and the employee does not have to sign the severance agreement. However, the employees should understand that they will not be entitled to the severance package if they do not sign the agreement. Employees should be told that they do not have to sign the severance agreement and release during the meeting (and generally should not sign during the meeting); but that they must return the agreement to a designated person no later than a specific cutoff date. Seven to ten days might be considered a reasonable cutoff, except when the package is offered to employees over the age of 40 (as discussed below). Employees should be given instructions as to where to return the signed agreement.

### 4. Requesting Waivers of ADEA Claims

Potential age discrimination claims against the employer may be waived by employees in exchange for something of value, but the waiver must satisfy additional legal requirements. These requirements will only apply to employees 40 years of age and older (that is, only to employees who can bring age discrimination claims). A valid waiver precludes the employee from suing the employer for any discriminatory practices under the ADEA that occurred prior to the execution of the waiver.

### 5. Older Workers Benefit Protection Act

In order to obtain a valid release of ADEA claims, employers must comply with the requirements of the Older Workers Benefit Protection Act (OWBPA). Enacted in 1990 as an amendment to the ADEA, the OWBPA limits the manner in which employees can waive their rights under the ADEA.

*Knowing and Voluntary Waiver*

Under the OWBPA, the waiver signed by the employee must be "knowing and voluntary." This requires, at a minimum, that the waiver be part of a written agreement between the employee and employer and drafted with language that can be understood by the employee. The waiver must specifically refer to claims under the ADEA and must advise the employee in writing to consult an attorney before signing. 29 U.S.C. § 626(f)(1).

*Required Revocation Period*

Employees must be given seven days after executing the agreement to revoke the agreement. Therefore, employers should consider delaying any benefits under the severance agreement until after the expiration of the revocation period.

*Required Consideration Period*

In connection with a single employee termination, the employee must be given **21** days to consider signing the agreement. Additional burdens are placed on employers requesting waivers as part of an exit incentive or other termination program offered to a group or class of employees. In this case, employees must be allowed **45** days to consider signing the agreement and employers must comply with the statutory informational requirements. 29 U.S.C. § 626(f)(1)(F).

Typically, the 45-day consideration period is required when employees are involuntarily terminated pursuant to a RIF or offered a standardized formula or package of benefits designed to induce employees to sever their employment voluntarily. However, the extended consideration period may arise in other situations, and employers should consult counsel regarding appropriate releases prior to implementing any group termination program.

*Informational Requirements*

The OWBPA also requires employers to provide information to employees prior to the execution of agreements offered as part of a group termination program. The purpose of these informational requirements is to provide employees with enough information regarding the program to allow them to make an informed choice whether to sign the waiver agreement.

To satisfy the informational disclosure requirement, the employer must disclose in written comprehensible language such things as (1) the class or group of employees

covered by the program; (2) the program's eligibility requirements; (3) the job titles and ages of all employees eligible for the program; and (4) the ages of all individuals in the same "job classification or organizational unit" not eligible for the program. 29 U.S.C. § 626(f)(1)(H).

As a practical matter, this typically means a list of affected job titles and the ages of the employees holding those positions and a parallel list of job titles and ages of employees *not* affected from the same departments or work groups.

*Determining the Job Classification or Organizational Unit*

Because the OWBPA does not provide a definition of "job classification or organizational unit," it has been difficult for employers to determine the appropriate data for disclosure. In 1998, the EEOC issued regulations in an attempt to clarify the disclosure requirements, but it remains a confusing area of law. The regulations define the scope of a "job classification or organizational unit" as a "decisional unit." Decisional units are the categories or groupings of employees affected by a program within the employer's particular organizational structure. 29 C.F.R. §§ 1625.22(f)(1)(iii)(C), (3)(i)(A).

Therefore, under the EEOC regulations, employers need to consider their organization's structure and decisionmaking process to determine whether disclosure of job titles and ages of particular groups of employees is required. A "decisional unit" is defined as "that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver." 29 C.F.R. § 1625.22(f)(3)(i)(B). Thus, a "decisional unit" is the process by which the employer chose certain employees and ruled out others for participation in the program.

*Age and Job Title Information*

Once the decisional unit is determined, the employer must comply with the EEOC regulation's requirements for disclosing age and job title information. Information regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year, such as "age 20-30," does not satisfy the requirement. Information regarding job titles must be broken down by grade level, or other established subcategories, within a job title or job category. 29 C.F.R. §§ 1625.22(f)(4)(ii)-(iii).

*Filing Lawsuits and the Tender Back Rule*

During a RIF, employers often are concerned about the risk of potential age claims and present employees with the option to waive potential age discrimination claims against the employer in exchange for an enhanced severance package. Employees who chose to sign the agreement are barred from pursuing a lawsuit against the employer under the ADEA *so long as the agreement is valid*. However, if the employer did not comply with the statutory requirements discussed above, the

agreement may be found invalid and the employee may be allowed to pursue a lawsuit—without first returning the money received under the agreement.

## IV. Final Compensation and Benefits

### A. Final Paycheck

An employee is entitled to be paid by the end of the regular pay period for any remaining wages owed. RCW 49.48.010.

### B. Commissions and Bonuses

Commissions and regularly accrued bonuses are "wages," which must be paid according to the terms of the applicable policy or plan.

### C. Withholding From Final Paycheck

In 2005 the Washington State Department of Labor and Industries adopted new rules restricting deductions from employees' wages. Those rules differentiate between deductions that may be taken only from an employee's **final** paycheck and deductions that may be made on an ongoing basis.

Under the current rules an employer may now take certain deductions from an employee's final paycheck without express prior authorization from the employee.

#### 1. With or Without the Employee's Agreement

The following deductions may be taken from an employee's final wages without the employee's agreement. These deductions are permitted even if they result in the employee receiving less than minimum wage:

- Deductions required by state or federal law;
- Deductions for nonoccupational medical, surgical, or hospital care or service; and
- Deductions to satisfy a court order, judgment, wage attachment or the like.

#### 2. With the Employee's Agreement

The following deductions may be made from an employee's final wages, but only **if specifically agreed to by the employee.** These deductions are permitted even if they result in the employee receiving less than minimum wage:

- Pension, medical, dental or other benefit plan contributions; and
- Payment to a creditor (including the employer) or a third party, so long as the payment is for the benefit of the employee (such as repaying a loan).

### 3. Other Permissible Deductions if Wages Do Not Fall Below Minimum Wage

The following deductions may be made from an employee's final wages, **but may not reduce them below the minimum wage**:

- Acceptance of a bad check or credit card in violation of procedures previously made known to the employee;
- Cash shortage **if** the employee had sole access to the cash and participated in the cash accounting at the beginning and end of the shift;
- Cash shortage, failure of customer to pay, or breakage or loss of equipment **if** it was caused by "a dishonest or willful act" of the employee; and
- Employee theft **if** it can be shown that the employee intended to deprive **and** the employer filed a police report.

These deductions are **only** permissible for incidents that occurred **during the final pay period**. WAC 296-126-025.

Illegal withholding risks double damages and attorneys' fees. RCW 49.48.030, 49.52.070.

## D. Vacation/Sick Leave

If accrued, and not subject to forfeiture upon termination, vacation is generally treated as part of compensation and paid out upon termination. If an employer wants to limit the obligation to pay out vacation time, its policy should be clearly stated to employees (e.g., with a policy that unused vacation is lost or that the maximum payout upon termination of employment will be a certain number of days or hours). In the absence of a written policy, an employer's practice should be consistent and any departure from standard practice should be justified. Generally speaking, accrued, unused sick leave need not be paid out upon termination of employment.

# V. After the Reduction in Force

## A. Written Statement of Reasons

Within 10 days of a request, a Washington employer must furnish a former employee with a signed written statement, giving the reasons for the discharge. WAC 296-126-050(3). Employers should provide timely, consistent and accurate statements in response to requests from employees affected by a RIF.

## B. Post-Layoff Hiring Practices

### 1. Employees

Even as an employer may be forced to shrink its workforce during hard economic times, it may still need to engage in strategic hiring. Continuing to hire employees while laying off employees is certainly not, in and of itself unlawful. An employer should, however, take care not to expose itself to discrimination claims by immediately filling a laid off employee's position with someone outside that employee's protected class. See Beaver v. Rayonier, 200 F.3d 723 (11th Cir. 1999), cert. dismissed, 529 U.S. 1095 (2000).

In the case of Beaver v. Rayonier, the Eleventh Circuit Court of Appeals held that the company's decision to cut 10 salaried employees from its workforce at the mill where plaintiff worked could not be second guessed with the use of evidence about the financial condition of the company as a whole or evidence about other cost-cutting steps that could have been taken instead of personnel reductions. However, the evidence that the company filled seven vacant supervisory positions, after letting plaintiff go, sufficed to show age discrimination. His qualifications were equal to or better than those of many of the people selected; six of seven of them were younger than he was; he had expressed his willingness to do anything in the plant; and there had been ageist comments about the need to attract young engineer-type employees. The arguments the company offered were not borne out by the evidence concerning its procedures in filling vacant positions. The lower court's denial of the company's motion for judgment as a matter of law was affirmed.

### 2. Independent Contractors

During tough economic times, in an effort to cut costs (e.g., fringe benefits, unemployment insurance contributions, social security taxes), some employers may consider expanding their use of independent contractors as they lay off employees.[7] A note of caution is warranted. Under numerous state and federal laws employers are constrained from misclassifying people who are "employees" as "independent contractors." The financial consequences of this type of misclassification can erase any potential savings.

Employers are well advised to consult with counsel before attempting to replace laid off employees with contingent workers. The statutory and common law tests (e.g., the so-called "control test," the "economic realities test," the hybrid "economic realities/control test" for determining who is an "independent contractor" versus an "employee" vary from state to state, and from federal statute to state statute, and from

[7] Unionized employers should note that while an employer's decision to close all or part of its business is not a mandatory bargaining subject under the Labor Management Relations Act, its decision to use subcontracting is a mandatory bargaining subject. See Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 213 (1964).

one state statute to another. Moreover, various laws distinguishing between "employees" and "independent contractors" are sometimes inconsistent with one another. As a result, it is possible in theory for an individual to be an employee for some purposes but an independent contractor for others.

The proper classification of workers is also likely to receive significant attention during the current session of Congress. Several federal bills aimed at alleged independent contractor abuses – including one co-sponsored by then-Senator Obama – were introduced during the 110th Congress (2007-2008):

**The Independent Contractor Proper Classification Act of 2007 (S. 2044)** and **The Taxpayer Responsibility, Accountability, and Consistency Act (HR 5804)** would have

- required employers to treat workers misclassified as independent contractors as employees for employment tax purposes upon a determination of misclassification by the Secretary of the Treasury;
- eliminated the ban on the IRS issuing regulations or revenue rulings on employee/independent contractor status;
- eliminated the defense of industry practice as a justification for misclassifying workers as independent contractors;
- created an administrative process for workers to ask for an evaluation of their proper classification; and
- added new whistleblower provisions.

**The Employee Misclassification Prevention Act of 2008 (HR 6111/S. 3648)** would have amended the Fair Labor Standards Act to

- require employers to keep records of non-employees (contractors) who perform labor or services (except substitute work) for remuneration;
- make it unlawful for any person to fail to accurately classify an employee or nonemployee, doubling the amount of liquidated damages for maximum hours, minimum wage, and notice of classification violations by an employer;
- require employers to provide each worker with written notice of the individual's classification as an employee or nonemployee and information concerning his or her rights under the law;
- subject a person who repeatedly or willfully violates notice requirements to a civil penalty not to exceed $10,000 for each violation; and
- require state unemployment insurance agencies to conduct audits to identify employers that have not registered under the state law or that are paying

unreported compensation where the effect is to exclude employees from unemployment compensation coverage; and to establish administrative penalties for misclassifying employees or paying unreported unemployment compensation to employees.

## PART 2—ALTERNATIVES TO REDUCTIONS IN FORCE

### I. Internal Changes

Depending on the employer's circumstances it may be able to avoid implementing a RIF by adopting other temporary measures, including:

- hiring freezes
- shortened workweeks
- furloughs
- pay reductions
- voluntary separation packages

### A. Separation Incentive Plans

Separation packages may be used for various purposes. First, voluntary separation packages may be used to give employees an incentive to voluntarily leave, thus reducing the need to involuntarily terminate employees. Second, separation packages can be used to give involuntarily terminated employees a financial "cushion" to ease the immediate impact of the layoff. Additionally, separation payments may be used as consideration given in exchange for an employee's release and waiver of claims.

### B. ESD Shared-Work Program

The Washington State Employment Security Department (“ESD”) Shared-Work Program offers Washington employers an alternative to layoffs of skilled employees during times of temporary economic downturn. Chapter 50.60 RCW. Under the voluntary employer-initiated program an employer may reduce an employee's full-time weekly work hours from 10 to 50 percent, and the employee can receive the same percentage of unemployment benefits.

**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.

The Shared Work Program is available to both public and private sector employers with as few as one employee. It does not apply to seasonal employers.

Currently, an employer must have the participation of at least 10 percent of its employees in a work unit or section to be eligible. On April 5, 2009, the restriction will be lifted to allow *any number* of employees to participate.

The ESD Shared Work Program Employer Handbook is available at http://www.esd.wa.gov/uibenefits/formsandpubs/shared-work-handbook.pdf.

## II. Risks Associated With Alternatives to Layoffs

### A. Discrimination Claims

While mandatory reductions in pay may seem like an obvious way to reduce staffing costs during an economic downturn, employers must remember that reductions in pay, like layoffs, can result in litigation. First, as noted above federal and state law prohibit an employer from treating an employee less favorably because of that employee's membership in a protected class. Thus, just as an employer should analyze its layoff decisions, it should in the same manner analyze its wage reduction decisions.

### B. Wage and Hour Claims

Pay reductions may also give rise to wage and hour claims. An employer may not reduce the pay of a nonexempt employee below the state or federal minimum wage. And an employer that implements a furlough program must be careful not to "furlough" overtime exempt employees in a manner that undermines their exemption from the provisions of state and federal overtime laws. In order to be exempt from the provisions of the Fair Labor Standards Act (FLSA) or the Washington Minimum Wage Act (WMWA) under the so-called white collar exemptions, an employee must meet <u>two</u> requirements. He or she (1) must perform certain duties; and (2) must be paid on a **salary basis**. An employee who meets one part of the test but not the other is not exempt from the overtime provisions of the law. In other words, the high-ranking executive who is paid on an hourly basis is entitled to overtime pay at the rate of one and one half times her hourly rate of pay for each hour worked over 40 in a workweek.

According to the DOL regulations amplifying the FLSA, generally an employee is considered to be paid on a "salary basis" for purposes of the exemption if:

> the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is

> ready, willing and able to work, deductions may not be made for time when work is not available.

29 C.F.R. § 541.602(a). Thus, an employer can lose the exemption by furloughing otherwise exempt employees for periods of less than a week and deducting a commensurate amount from their wages.

Washington employers should also note that, even in the hardest of economic times, while they can reduce the wages of employees, they cannot avoid paying employees at least the minimum wage. In Washington, willful failure to pay any part of wages owed gives rise to a claim for double the amount of wages owed plus attorneys fees and costs, and, is a misdemeanor.

In the case of Chelius v. Questar Microsystems, Inc., 107 Wn. App. 678 (2001) two plaintiffs sued the individual partners of their former employer to recover unpaid wages, double damages, and attorney's fees under RCW 49.52.050 and .070. At issue was whether the plaintiffs knowingly submitted to their nonpayment of wages, making exemplary damage unavailable to them under the statute. One plaintiff was hired as the head of the company's marketing department and the other plaintiff was the company's program manager. When the marketing manager left the company, he was owed back wages of $34,218.75, plus taxes, withholdings and consulting fees. At the time of the program manager's termination from employment, he was owed back wages of $133,000 plus taxes and additional unreimbursed expenses.

The employers argued that they were not liable for exemplary damages to either plaintiff because the employees had "constructively" agreed to work for the company without pay. The Court rejected that argument because RCW 49.52.050 does not provide for "constructive" submission to nonpayment of wages. The employer also argued that there was a bona fide dispute over its obligation to pay because it had arranged for the purchaser of the company to pay the employees' wages when they sold the company. The Court rejected that argument because "[u]nless a creditor consents, a debtor cannot avoid liability for a debt by obtaining a third party's agreement to pay it." The employer knew the purchasing company had not paid wages and had concealed the agreement from the employees in an attempt to assist the purchaser of the company not to pay wages.

In the case of Morgan v. Kingen, 141 Wn. App. 143 (2007) review granted, over 180 former employees of Funsters Grand Casino, Inc. sued the officers of the company in a class action lawsuit to recover unpaid wages totaling over $179,000. At issue was whether bankruptcy proceedings could relieve the officers of liability for willful withholding of wages. The company filed for Chapter 11 bankruptcy in August 2002. As debtors-in-possession, the officers continued to manage the business and made financial decisions about which creditors to pay. Business did not improve, and on April 7, 2003 the company filed for Chapter 7 liquidation. The company's assets after liquidation were not enough to cover the company's debts. The bankruptcy court refused to allocate any of the seized funds to pay wages.

The officers argued that the bankruptcy proceedings relieved them of liability to pay wages. The Court held that the company's bankruptcy proceedings did not relieve the officers of personal liability and that the officers' withholding of wages was willful. After filing for Chapter 11 bankruptcy, the officers continued to operate the company as debtors-in-possession, making payroll decisions and controlling payments to employees and creditors, thus making their decision not to pay wages volitional. The Court further held that the officers' failure to pay wages due after the company filed for Chapter 7 bankruptcy was willful. Even if it could be argued that Chapter 7 bankruptcy relieved the officers from liability, the company did not have sufficient cash to pay wages when the second payment was due on April 11. Under Washington law, financial inability to pay is not a defense to personal liability. The Court affirmed the lower court's award of double the gross amount of wages before the withholding of federal income tax, social security and Medicare.

## C. The WARN Act

Employers covered under the WARN Act should also note that the definition of "employment loss" under the Act includes: "a reduction in hours of work of more than 50 percent during each month of any 6-month period." 29 U.S.C. § 2101(a)(6)(C).

# APPENDIX A

## REDUCTION IN FORCE CHECKLIST

**Preparing for a Reduction in Force –**

Have you:

- ☐ Considered RIF alternatives? (e.g., hiring freeze, wage freeze, forced time off)?
- ☐ Reviewed company policies as they may relate to layoffs or RIFs?
- ☐ Reviewed all existing offer letters, employment contracts, collective bargaining agreements, etc., for terms related to matters such as severance rights, seniority rights, and bumping rights?
- ☐ Articulated and documented the business justification for the RIF?
- ☐ Determined whether to eliminate positions and/or temporarily lay off employees?
- ☐ Decided whether to offer severance pay in exchange for a release agreement?
- ☐ Decided whether to offer a voluntary separation incentive program?
- ☐ Determined whether the RIF will result in the permanent or temporary shutdown of a single site or a unit within the site causing 50 or more employees to have an employment loss (which includes a 50 percent reduction in hours, or a layoff, over a six-month period)?
- ☐ Determined whether the RIF will result in an employment loss for 500 or more at a single worksite in a 30-day period?
- ☐ Determined whether the RIF will result in an employment loss for 50 or more employees constituting 33 percent or more of the workforce at a single worksite?
- ☐ (If applicable) Prepared and sent WARN Act notices?
- ☐ (If applicable) Engaged in "effects" bargaining with union(s)?
- ☐ Established selection methodology and criteria?
- ☐ Planned the timing and methodology of communicating the selection decisions?
- ☐ Selected and trained the individuals who will initially identify employees for layoff?
- ☐ Analyzed the impact of the initial selections with legal counsel?
- ☐ Made final selection decisions?
- ☐ Documented the selection process?
- ☐ (If applicable) Collected the OWBPA disclosure information?
- ☐ (If applicable) Drafted incentive plans and/or release agreements?
- ☐ Prepared a plan for the return of company property and the protection of trade secrets/intellectual property?
- ☐ Determined the state-by-state timing and amount of final wages and benefits?