INTELLECTUAL PROPERTY ASPECTS OF DOING BUSINESS IN CHINA

Elizabeth Chien-Hale
Institute for Intellectual Property in Asia

© Copyright 2007
Attachment I: Copyright © 2006 Peter K. Yu.
Reprinted with permission of the author
Attachment II: Copyright © 2005 Peter K. Yu.
Reprinted with permission of the author.
Chapter 13

Reductions in Force

§ 13:1 Introduction
§ 13:2 Discrimination and Common Law Causes of Action
  § 13:2.1 Potential Discrimination Claims
    [A] In General
    [B] Burden of Proof
    [C] Disparate Treatment Versus Disparate Impact Theories
  § 13:2.2 Common Law Claims
  § 13:2.3 Evidentiary Considerations
    [A] Impermissible Statements
    [B] Reorganized Job Responsibilities
    [C] Statistics
    [D] Competence and Performance
    [E] Cost Factor
  § 13:2.4 Potential Liability and Damages
§ 13:3 Alternatives to a Reduction in Force
  § 13:3.1 Voluntary Separation Programs (VSPs)
    [A] Typical Features of VSPs
    [A][1] Severance Benefits
    [A][2] Eligibility
    [A][3] “Window Periods”
    [B] Are Incentives Permissible?
    [C] VSPs and Discrimination
    [D] Voluntariness
  § 13:3.2 Early Retirement Programs (ERPs)
    [A] Legal Considerations
    [B] Age As a Criterion of Plan Eligibility and Benefits
    [C] Voluntariness
  § 13:3.3 Potential ERISA Liability for Misrepresentation
    of or Failure to Disclose Future Enhanced Retirement Packages or Benefits
§ 13:4 Planning for a Reduction in Force
  § 13:4.1 Establish Corporate Justification for RIF
  § 13:4.2 Practical Considerations for Implementing a Reduction in Force
[A] Workforce Analysis and Demographics
[B] Management Training
[C] Notification to Employees
[D] Selection of Employees for Retention
[D][1] General
[D][2] Jobs and Their Relative Value
[D][3] Evaluation and Relative Ranking of Employees
[D][3][a] Performance Evaluations Generally
[D][3][b] Evaluation Criteria
[D][3][c] Existing Versus New Evaluations
[D][3][d] Comparative Employee Ranking
[E] Oversight
[E][1] Workforce Analysis
[E][2] Evaluation of Jobs/Employees
[E][3] Thorough Review of Individual Problems
[E][4] Exit Interview
[F] Post-RIF Considerations

§ 13:4.3 Obtaining Releases
[A] General Waiver Requirements Under the OWBPA
[B] “Knowing and Voluntary” Requirement
[C] Wording of Waiver Agreement
[D] Specific Referral to Rights or Claims
[E] Waiver of Future Rights
[F] Consideration
[G] Consultation with Attorney
[H] Time Periods
[H][1] Time to Consider Agreement
[H][2] Time to Revoke Release
[I] Informational Requirements
[I][1] Exit Incentive or Other Employment Termination Programs
[I][2] Organizational Unit, Defined
[I][3] Eligibility Factors
[I][4] Presentation of Information
[I][4][a] Categorization of Employees
[I][4][b] Scope of Disclosure
[J] Other Requirements Under OWBPA
[J][1] Waivers Settling Charges or Lawsuits
[J][2] Burden of Proof
[J][3] EEOC’s Enforcement Power
[K] EEOC Regulations on ADEA Waivers
[K][1] No Ratification of Waiver by Employee’s Retention of Severance Payments
[K][2] “Tender Back”
[K][3] Restitution/Set-Off
[K][4] Covenants Not to Challenge Waiver
[K][5] Abrogation
[K][7] Invalid Waiver As a Separate Cause of Action
[K][8] Effect of Invalid Waiver on Timeliness of ADEA Suit
[L] OWBPA Requirements Not Applied to Non-Age Claims
[M] Admissibility of Unsigned Agreement in ADEA Action

§ 13:5 Worker Adjustment and Retraining Notification Act (WARN)

§ 13:5.1 Who Must Give Notice

§ 13:5.2 Mass Layoffs and Plant Closings Under WARN
[A] Plant Closing Defined
[B] Mass Layoff Defined
[C] Single Site of Employment Defined
[D] Part-Time Employee Defined
[E] Employment Loss Defined
[F] Losses Must Be Aggregated
[G] Temporary Losses
[H] Temporary Hire Exception
[I] Strike or Lockout Exception

§ 13:5.3 To Whom Must Notice Be Given and What a Valid Notice Must Include
[A] To Whom Must Notice Be Given
[B] What a Valid Notice Must Include

§ 13:5.4 When Less Than Sixty Days’ Notice Can Be Given
[A] Faltering Company Exception
[B] Unforeseeable Circumstances Exception
[C] Act of Nature Exception

§ 13:5.5 Penalties for Violating WARN
[A] Penalties
[B] Payments in Lieu of Notice

§ 13:5.6 California WARN Act
[A] Labor Code Section 1400 et seq. Applies to More Employers Than WARN Covers
[B] Labor Code Section 1400 et seq. Appears to Cover Parent Companies
[C] Absent Extraordinary Circumstances Covered Employers Must Provide Notice of Layoffs, Relocations or Terminations or Face Significant Damages and Stiff Penalties

§ 13:6 Conclusion

Appendix 13A Sample Notices of Plant Closure
Appendix 13B Sample Notices of Mass Layoff

735
Appendix 13C  Sample Notice to State Dislocated Worker Unit and Local Government
Appendix 13D  Sample Corporate Policy Statement
Appendix 13E  Sample Reorganization Guidelines for Management
Appendix 13F  Sample Schedule of Reorganization Activities
Appendix 13G  Considerations for Conducting Termination Session
Appendix 13H  Sample Presentation of Statistical Information
Appendix 13I  Confidential Oversight Analysis

§ 13:1  Introduction

This chapter is intended as a practical guide to implementing a reduction in force (RIF) and examines the more common legal issues (including discrimination and wrongful discharge claims, as well as Worker Adjustment and Retraining Notification Act notices, and the use of releases under the Older Workers Benefit Protection Act) that may arise in the context of reducing a workforce. This chapter also discusses ways management can reduce its exposure to employee claims when implementing a RIF. Please keep in mind that the following guidelines are only useful insofar as they are applied consistently, uniformly, and with good faith to all termination decisions. As one court explained, “an employer’s conscious, unexplained departure from its usual policies when conducting a RIF may in appropriate circumstances support an inference of . . . discrimination. . . .”

§ 13:2  Discrimination and Common Law Causes of Action

§ 13:2.1  Potential Discrimination Claims

[A]  In General

Discrimination (EEO) laws constitute exceptions to an employer’s traditionally broad discretion to discharge employees. Under applicable EEO laws, a discharged employee may sue only if he was let go for a prohibited reason such as race, sex, color, national origin, religion, disability, citizenship status,

1. This chapter was prepared by Gary R. Siniscalco and Oswald Cousins. Mr. Siniscalco is a senior employment law partner in Orrick’s San Francisco office. Mr. Cousins is an employment law partner in Orrick’s San Francisco office.
2. Tyler v. UNOCAL, 304 F.3d 379 (5th Cir. 2002).
and age. Many state laws extend the list of prohibited grounds to marital status, political affiliation, and sexual orientation.

[B] Burden of Proof

Although the particular elements of a cause of action may differ from statute to statute, a prima facie case of discrimination in a RIF case under any of these laws commonly uses the same or very similar model of proof. The plaintiff must show that:

1. she is a member of a protected class;
2. she was qualified to hold a position that existed after the RIF; and
3. there is direct or circumstantial evidence that belonging to a protected class was a causative factor in the termination.

Once a prima facie case has been established, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory business reason why the plaintiff was selected for layoff. RIFs are generally considered a per se legitimate reason to discharge employees. Thus, courts have generally held that in bona fide plant closing and RIF situations, an economic need to reduce the workforce is a legitimate nondiscriminatory business reason.

Once the employer offers a legitimate nondiscriminatory reason for the plaintiff’s termination, the plaintiff must introduce evidence that the employer’s stated reason was merely pretext for discrimination. Although the overall burden of persuasion remains with plaintiff to demonstrate that the real reason for his or her termination was discrimination, the U.S. Supreme Court has arguably made it easier for plaintiff’s to meet this burden. In Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000), the Supreme Court held that in some instances a showing of pretext in addition to the prima facie case may be sufficient to avoid summary judgment and even to support a jury verdict in plaintiff’s favor. The court stated that, “it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer’s explanation.”

As a result of Reeves, it may be more difficult for employers to obtain judgment as a matter of law in wrongful termination/discrimination cases. Thus, it is now more important than ever that employers take great care in preparing for and executing any RIFs, and that they ensure that they are consistent in asserting both their reasons for the RIF and for selecting particular employees for termination. An employer who fails to exercise such diligence increases the opportunities for terminated employees to challenge the RIF and to raise an inference of pretext.

Disparate impact theory, in contrast to disparate treatment theory, involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of a discriminatory motive is not required under a disparate impact theory.

A prima facie case of disparate impact requires a plaintiff to prove, generally through statistical comparisons, that the challenged practice, selection device, or termination has a substantial adverse impact on a protected group. At this point, the defendant may criticize the statistical analysis or offer different statistics that show a lack of an adverse impact. Once the plaintiff establishes a disparate impact, the employer must prove that the challenged practice is “job-related for the position in question and consistent with business necessity.” Even if the employer satisfies his showing of job-relatedness and business necessity, the plaintiff may still prevail by showing that the employer has refused to adopt an alternative employment practice which would satisfy the employer’s legitimate interests without having a disparate impact on a protected class.

Historically, the disparate impact theory has only been used to prove Title VII claims arising out of a RIF. However, in Smith v. City of Jackson, 544 U.S. 228 (2005), the Supreme Court held that a disparate impact theory could also be applied to claims under the ADEA. In Smith, the city of Jackson, Mississippi implemented a new pay plan in which employees with fewer than five years of tenure received relatively larger pay increases than employees who had more than five years of service. A number of employees over the age of forty filed suit, alleging both disparate treatment and disparate impact under the ADEA. The trial court entered summary judgment in favor of the city on both claims. On appeal, the Fifth Circuit noted a “clear textual difference” between the ADEA and Title VII, which it interpreted to mean that the ADEA was not intended to cover disparate impact claims.

The U.S. Supreme Court rejected that analysis, holding that a disparate impact theory was permissible under the ADEA. However, the Court adopted a narrower scope of disparate impact liability for ADEA cases because “age, unlike race or other classification . . . not uncommonly has relevance to an individual’s capacity to engage in certain types of employment,” and that as a result, “certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group.” Id. at 240–41. The Court held it was an ADEA plaintiff’s burden under a disparate impact theory to identify a

---

7. Id.
specific act that causes a statistical impact on older workers and to persuade the fact finder that the employer’s stated business justification was unreasonable. The Court affirmed summary judgment in favor of the city on the grounds that it had based its decision on a “reasonable factor other than age.” In particular, the Court noted that the plaintiffs had simply pointed out that the city’s plan was less generous to older workers than younger workers, but had failed to “identify any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers.” The Court further observed that employers should not be held liable “for the ‘myriad of innocent causes that may lead to statistical imbalances.’” Id.

Although some commentators believed Smith would lead to an explosion of disparate impact age claims, this has not been the case. To the contrary, it appears that Smith has made it more difficult in some cases for plaintiffs to state or prevail on claims for disparate impact age discrimination. See, e.g., Chouinard v. N.H. Dep’t of Corr., 157 F. App’x 322, 324 (1st Cir. 2005) (plaintiff failed to identify a specific practice that disadvantaged her and other older workers); Rossiter v. Potter, 2005 U.S. Dist. LEXIS 10422 (D. Mass. 2005) (affirming summary judgment for plaintiff because Title VII disparate impact analysis is not applicable to claims under ADEA); Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 140 (2d Cir. 2006) (vacating judgment and entering summary judgment in favor of defendant employer on ADEA disparate impact claim because challenged employment action was reasonable); Houser v. Carpenter Tech. Corp., 216 F. App’x 263, 264–65 (3d Cir. 2007) (attempt to amend complaint to add disparate impact ADEA claim would be futile because plaintiff could identify no specific test, policy or practice with disparate impact on older workers).

§ 13:2.2 Common Law Claims

In addition to claims of discrimination under federal law, employees may have common law claims grounded in state law which include:

- Tort-based wrongful discharge claims based on public policy. To assert a public policy tort cause of action, an individual must identify a specific state statute. For example, termination for refusing to perform a criminal action for an employer or termination of someone for pursuing a workers compensation claim.

- Contract-based wrongful discharge claims. May be a breach of a written, oral, or implied-in-fact contract. Employment handbooks may, but often do not, give rise to contract based claims. However, a company must be careful when drafting covenants not to compete as they are required to be reasonable in regard to limiting geographic location, job type, and time frame. Employer policies that provide for the recall or transfer of laid-off employees may give rise to contract claims.
Liability may be imposed on an employer on the basis of traditional tort doctrines, including fraud, misrepresentation, defamation, intentional or negligent infliction of emotional distress. This type of claim involves an extremely high standard.

Employers with union-represented employees should also be conscious of the requirements of their union contracts regarding terminations and reductions in force. For example, on July 10, 2003, an arbitrator ordered Verizon Communications, Inc. to reinstate more than 2,300 union employees, with backpay, whom it had laid off as “surplus” because the company had not complied with the language of its collective bargaining agreement.

§ 13:2.3 Evidentiary Considerations

Evidence of discrimination generally arises from: statements made by management personnel responsible for selecting employees for layoff, failure to follow procedures in personnel manuals, collective bargaining agreements, or individual employment contracts, and inconsistencies in data shown in performance appraisals, histories of merit pay increases, promotions, or employee rankings.

[A] Impermissible Statements

Evidence that management referred to the age of the plaintiff or other older workers is frequently scrutinized to determine evidence of discrimination or pretext. Careless statements of managers expressing the view that someone is “over-the-hill” or that they want a younger person in the job may constitute circumstantial evidence of age bias. Generally, the weight of such comments depends on whether they are related to the employment decision at issue, their temporal proximity to the employment decision, and whether they were made by managers, supervisors, or other decision makers. Other examples of problematic statements include:

- “looking for younger single people”;
- the company “prefers to extend a youthful look to its customers”;
- the company “harbors a companywide animus toward older employees”;
- “old fart.”

11. Id.
The evidentiary impact can be greater if the offending phrase is recorded in memoranda, videotape, audiotape, or email. However, age-related comments will not support a finding of liability where they are ambiguous, not related to the employment decision, not close in time to the decision, or made by a non-decision maker.

[B] Reorganized Job Responsibilities

The fact that the job duties of eliminated positions are assumed by younger employees does not necessarily establish age discrimination. Generally, courts do not require employers to transfer or find a different job for the terminated or laid off employee, unless company policy requires otherwise. Nevertheless, employers should apply all replacement and transfer policies fairly to all employees or risk claims of discrimination and pretext.

[C] Statistics

Although statistical evidence is frequently offered by both parties, courts find it less probative of age discrimination in a RIF context because they recognize that younger workers constantly enter the workforce and replace older workers. Regardless of whether offered by plaintiff or employer, all statistical evidence must be reliable and relevant to the issues of discrimination to support or rebut a claim of discriminatory motive. The appropriate universe for statistical analysis is generally regarded to be the actual pool of affected employees. Courts also consider the relevance of the statistical pool to the source or

15. Adams v. Ameritech, 219 F.3d 612 (7th Cir. 2000); see also Bender v. Hecht’s Dep’t Stores, 455 F.3d 612 (6th Cir. 2006) (relevant group for statistical analysis must include (1) the plaintiffs’ position, (2) all the jobs slated for elimination that were reviewed by the same decision makers, and (3) all equivalent, but only the equivalent, positions held by plaintiff); Rummery v. Ill. Bell Tel. Co., 250 F.3d 553, 559–60 (7th Cir. 2001) (plaintiff’s statistical data did not, taken alone, show disparate treatment, especially because it did take into account nondiscriminatory explanations); Radue v. Kimberly Clark Corp., 219 F.3d 612 (7th Cir. 2000) (plaintiff’s statistical data offered insufficient because it involved a different part of company, information from prior RIF, and was not related to plaintiff’s claims); Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999) (plaintiffs’ statistical analysis flawed because they failed to focus on proper employment practice or relevant population).
scope of any alleged animus or pretext.\textsuperscript{17} Courts often look at the average age of employees before and after the RIF.\textsuperscript{18} Therefore the planning process should always involve a statistical analysis of the composition of protected classes pre and post RIF.

[D] Competence and Performance

When a company is acquired, or when financial problems dictate reorganization, competent employees may be laid off, even though they might have been retained in other circumstances. It is also permissible for an employer to discharge an employee deemed to be poor or “marginal” when the company faces financial difficulties. However, employers must make certain that any underlying performance evaluations or assessments are free from discriminatory or retaliatory bias. For example, in Winarto v. Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276 (9th Cir. 2001), the Ninth Circuit affirmed a jury verdict finding that a plaintiff’s termination in a RIF was retaliatory even though it was based on low performance scores. The court noted that the human resources supervisor made no effort to determine whether plaintiff’s scores were motivated by retaliatory or discriminatory animus and, that at “trial, defendants offered little evidence to show that the scores were based on anything but retaliation.” Id. at 1285.

[E] Cost Factor

Older employees tend to be among the higher paid staff in the workforce. When high salary is one of several criteria used in selecting employees for layoff, it does not necessarily establish a discriminatory motive or impact. The U.S. Supreme Court recently clarified that there is no violation under the ADEA when the factor motivating the employer is some feature other than the employee’s age, even when the other factor is highly correlated with age. In Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), the Court ruled that termination decisions based on factors such as pension status, seniority and salary

\textsuperscript{17} Thus, for example, in MacDissi v. Valmont Indus., 856 F.2d 1054 (8th Cir. 1988), departmental rather than company-wide statistics were used in order to evaluate whether the department head discriminated in his RIF selections.

\textsuperscript{18} See \textit{Bender}, 455 F.3d at 622 (1.7-year difference in average age is not significant enough to raise inference of discrimination); Stidham v. Minn. Mfg., Inc., 399 F.3d 935, 938 (8th Cir. 2005) (mere four percent decrease—from 72\% to 68\%—in overall number of employees over the age of forty did not support inference of age discrimination); Rose v. Wells Fargo & Co., 902 F.2d 1417 (9th Cir. 1990) (no bias found where the employer’s statistics indicated that average age of the workforce \textit{increased} after reorganization); Bibby v. Drummond Co., 818 F. Supp. 325 (N.D. Ala. 1993) (same), aff’d without opinion, 20 F.3d 1174 (11th Cir. 1994).
do not, unless used as a proxy for age, violate the ADEA—although they might violate other laws, such as ERISA.

In Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125–26 (7th Cir. 1994), the court concluded that “[w]age discrimination is age discrimination only when wage depends directly on age, so that the use for one is a pretext for the other; high covariance is not sufficient [internal citation omitted].” The court explained that a younger worker who spent his entire career with one employer may earn a higher salary than an older worker who was recently hired by the same employer. Thus, the court concluded, age and wage levels are “analytically distinct” and an employer can take account of one while ignoring the other. Id. at 1126.

§ 13:2.4 Potential Liability and Damages

Under Title VII and the ADEA, successful plaintiffs are entitled to lost wages, lost pension, other fringe benefits, interest, reinstatement, lost future compensation, front pay, and attorneys’ fees.¹⁹ Plaintiffs also may be able to recover certain expenses incurred after termination, such as the costs of starting up a new business. If a claimant sues under state anti-discrimination laws, general pain and suffering damages and punitive damages may be available in some states, including California. Under certain circumstances, courts may issue injunctions. However, courts will typically not issue injunctions for the mere loss of a job, since that loss may ordinarily be remedied by damages if the litigant prevails.

The ADEA provides for an award of liquidated damages equal to double the amount of lost wages when the employer has committed a “willful” violation of the Act. A willful violation occurs where the employer knew or showed a reckless disregard for the matter of whether its conduct was prohibited by the ADEA. Once a “willful” violation has been demonstrated, “the employee need not additionally demonstrate that the employer’s conduct was outrageous, or produce direct evidence of the employer’s motivation, or prove that age was the predominant rather than a determinative factor in the employment decision.” See Hazen, at 604.

By its nature, a RIF, layoff or reorganization involves a number of employees similarly affected by a common adverse action. Class actions have thus been brought in Title VII and common law cases. The ADEA does not permit

¹⁹. The Civil Rights Act of 1991 amended Title VII so as to provide for general compensatory and punitive damages. Compensatory damages are permitted to compensate a plaintiff for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.” 42 U.S.C. § 1981a(b)(3). Punitive damages may be awarded only if the plaintiff proves that the defendant engaged in a discriminatory practice or practices with “malice or with reckless disregard to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981a(b)(1).
traditional class actions under Rule 23 of the Federal Rules of Civil Procedure. Instead, the “opt-in” procedures of the Fair Labor Standards Act apply. 29 U.S.C. § 216(b). The principal difference is that, in an ADEA action, each plaintiff must consent to join the action separately, and no one is bound by the judgment unless he opts in. This procedure makes it easier for plaintiffs who have missed the administrative filing deadlines, which normally are a prerequisite to suit, to join in a pending action without first filing an administrative charge.

§ 13:3 Alternatives to a Reduction in Force

Given the need to justify termination decisions, a company may want to explore various alternatives to termination before implementing a RIF. An employer that can show it considered alternatives to laying off employees stands a better chance of convincing its employees as well as the EEOC, a judge, or jury, that it acted in fairness and out of necessity in resorting to employee terminations to improve its financial condition. Among the alternatives to a RIF that a company may want to consider are the following:

• shortened work weeks or workdays;
• temporary plant shutdowns;
• voluntary reverse seniority layoffs with partial pay;
• work-sharing;
• voluntary reduced-pay training programs to increase potential for interplant transfers;
• use of federal job training assistance;
• reductions in authorized overtime;
• voluntary leaves of absence;
• salary freezes or salary reductions;
• hiring freezes if attrition is high;
• voluntary separation programs;
• early retirement incentive programs.

§ 13:3.1 Voluntary Separation Programs (VSPs)

There are several reasons an employer might utilize a VSP rather than an involuntary RIF or some other method to reduce its workforce.

First, VSPs can significantly reduce the amount of litigation resulting from downsizing a business. Employees taking advantage of a VSP leave the company
voluntarily and are naturally less likely to bring an action against the employer than individuals who have been terminated against their will. In addition, VSPs usually involve the signing of a voluntary release or waiver by the resigning employee. Further, VSPs that are truly voluntary will most likely be upheld as legitimate and nondiscriminatory if subsequently challenged. In comparison to early retirement programs, VSPs are less likely to result in age discrimination claims because they are offered to older employees and younger employees alike, and are not normally related to pension plans or retirement benefits.

Second, VSPs may be easier to implement from a human resources perspective. VSPs essentially require the employer to design a suitable plan and decide to whom it should be offered. They normally do not require the often complex procedures for implementing an involuntary RIF program, such as performance evaluation programs, employee comparisons, and internal review procedures. In addition, VSPs avoid or alleviate the difficult emotional, psychological and economic effects of involuntary RIFs on both employees and management.

[A] Typical Features of VSPs

[A][1] Severance Benefits

An employer has several options in structuring severance benefits in connection with a VSP. Many of the options raise issues under ERISA and the tax laws that are beyond the scope of this chapter, but that must be explored when a program is being devised.

Severance benefits can take the form of a single lump-sum cash payment upon the employee’s resignation. As an alternative, payments can be made in several installments over a period of time, coupled with a continuation of benefits. Caveat: An employer choosing to stretch out severance payments should be aware that continuing payments over too long a period (for example, over two years) could result in the VSP being considered a pension plan under ERISA. Also, severance payments exceeding the value of two years’ salary would also render the VSP an ERISA pension plan.

Most typically, the amount of severance benefits offered is based on length of service, with benefits increasing along with years of service. For example, a VSP might offer $1,000 per year of service up to a maximum of twenty-five years ($25,000). However, an employer may decide to offer a uniform amount to all employees being offered the VSP.

[A][2] Eligibility

An employer will often wish to limit eligibility for the VSP to only certain employees. Eligibility for VSPs can be determined by various factors. The following are examples of criteria used in limiting VSP eligibility:
Length of Service. An employer may not want to offer VSP benefits to employees who have been with the company only a short period of time. Therefore, VSP eligibility may be offered only to employees with a minimum length of service, for example, three years. Caveat: Employers instituting a length of service requirement should not use too long a time period, for example, fifteen or twenty years. This may lead to possible age discrimination claims based on the fact that the employer was only trying to induce older employees to leave.

Performance. Frequently, an employer may not want to allow poor performers to take advantage of a VSP. At the same time, the employer may wish to avoid losing its most valued employees. Therefore, VSP eligibility may be limited on the basis of performance, that is, the plan will exclude very poor performers who will probably be terminated outright, and will also exclude highly competent employees the employer wants to remain.

Organizational Unit. In cases where the employer needs to downsize only certain units or departments, it can offer VSPs only in those particular areas.

Other Limitations.

- Job function.
- Compensation level.
- Exempt, salaried, or hourly status.
- Offer only to specific employees.

Limitations on eligibility are chosen by the individual employer, according to its particular circumstances, goals, and needs for reducing its workforce.

Window Periods

Employees are normally given a limited period of time to decide whether to take advantage of a VSP. For example, an employer may specify a particular thirty-day period in which a VSP is available. An employee wishing to volunteer to leave may elect the program before the end of the thirty-day period. These types of time periods are referred to as “window periods.” An employer using VSP window periods should make these periods long enough to give employees a sufficient opportunity to reflect on whether to take part in the VSP. A short window period could make the VSP vulnerable to a challenge on the grounds that it was not truly voluntary. Thus, window periods should be at least three weeks, and preferably thirty days. Finally, where the employer is seeking releases from employees over the age of forty as part of a VSP, then they must also provide forty-five days of notice plus disclosures pursuant to the Older Worker’s Benefit Protection Act.
[B] Are Incentives Permissible?

As a practical matter, the design of a voluntary termination plan will have a substantial effect on whether older or younger employees elect to retire, which, therefore, raises the question as to whether offering incentives can result in a violation of the ADEA. In 1990, Congress amended the ADEA by enacting the Older Workers Benefit Protection Act (OWBPA) 20 to help guard against age discrimination in the administration of employee benefit plans and early retirement incentives. 21

The OWBPA operates under an “equal cost” principle for age discrimination and employee benefit plans. Thus, the OWBPA makes it lawful to observe the terms of a bona fide employee benefit plan where:

for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under Section 1625.10, title 29, Code of Federal Regulations, as in effect on June 22, 1989. . . .

The OWBPA, however, provides a limited exception to the “equal cost” rule for employers to utilize early retirement incentive programs. Thus, it is not unlawful for employers to observe the terms of a bona fide employee benefit plan:

that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of the Act. . . .

This exception for early retirement programs was made because the EEOC testified before Congress that these programs were allowed under prior law not because of the equal cost justification but, instead, because they were voluntary and served a legitimate business purpose. The following examples were given as the kinds of voluntary early retirement incentive programs that would be approved:

- Flat dollar incentives (for example, $20,000).
- Service-based benefits (for example, $1,000 times number of years of service).
- Percentage of salary.

21. The enactment of the OWBPA overturned the U.S. Supreme Court’s decision in Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158 (1989), which held that an employer could follow the terms of a “bona fide” employee benefit plan even if it discriminated against older employees (e.g., by capping their benefits), unless the plan discriminated in some other aspect of the employment relationship.
Flat dollar increases in pension benefits (for example, $200 per month).

Percentage increases in pension benefits (for example, 20%).

Imputation of years of service for pension benefits.

Finally, the Committee Reports expressly approve the use of these incentives during a “window” period.22

[C] VSPs and Discrimination

One of the advantages of VSPs is that they are offered to both younger and older workers, and they therefore do not pose the age discrimination problems which often accompany early retirement programs. However, there are several ways in which a VSP could lead to discrimination or wrongful discharge claims.

The selection of particular groups of employees in offering VSPs could increase the risk of discrimination claims. Even though it is permissible and often desirable to offer VSPs to only selected employee groups, an employee could charge that the selection of those groups reflects age or other discriminatory bias on the part of the employer. For example, if the employer only offers VSPs to older employees, or women, or minorities, this could be used as evidence of discriminatory intent by the employer. Thus, in choosing eligible employees to whom VSPs will be offered, the employer should analyze the make-up of these groups and determine if it appears the company is trying to get rid of a particular protected class. The safest approach is to offer VSPs to all employees across the board.

In addition, the employer should analyze whether the VSP will have a statistically greater impact on a protected class. To do this, the employer can review the demographics of the eligible group of employees to see whether there is any unintended adverse statistical impact on any protected group. If this is the case, adjustments may need to be made to the program. Although evidence of disparate impact in a VSP will rarely alone be sufficient to sustain a discrimination claim, such statistics can be used to bolster other evidence of discrimination the plaintiff may have. Therefore, adverse impact should be avoided where possible.

22. The only kind of early retirement incentive program specifically disapproved was the type found in Karlen v. City Colls. of Chi., 837 F.2d 314 (7th Cir. 1988), wherein the employer had an age-based phase-out of a lump sum distribution of accumulated sick pay, and the employer refused to make retiree medical and insurance benefits available to those who retired after age sixty-four.
The central question a court looks at when determining the lawfulness of a voluntary separation program is whether the employee has voluntarily elected to retire or otherwise terminate employment. It is essential that management present termination as an option and stress that eligible employees are under no obligation to accept this option.23

An example of how not to carry out a VSP is described in Anderson v. Montgomery Ward & Co., 650 F. Supp. 1480 (N.D. Ill. 1987), vacated, 704 F. Supp. 162 (N.D. Ill. 1989). The plaintiffs in that case alleged that Montgomery Ward violated the ADEA when it urged older workers to leave the company under a “voluntary separation program,” or be fired from their jobs without benefits. Montgomery Ward asserted that the plaintiffs voluntarily left the company and waived all subsequent ADEA claims upon signing the separation agreement.

There was evidence that company officials told selected employees not to accept the voluntary severance program while overtly, or more subtly, informing others that they would be fired if they failed to accept it.

The court noted that it was common knowledge that the company wished to rid itself of all persons offered the voluntary separation option other than those it specifically asked to stay, and that the new management was likely to fire any employee who rejected the offer and remained. Under these circumstances, the court concluded, it was reasonable for employees to feel compelled to resign.

Another example of what not to do can be found in James v. Sears, Roebuck & Co., 21 F.3d 989 (10th Cir. 1994). There, the court upheld a jury verdict in favor of six former employees and held that Sears’ early retirement plan violated the ADEA. Specifically, the court found that the employees were constructively discharged by Sears because Sears pressured the employees to accept early retirement in order to achieve its predetermined “retirement” quota. The court explained that “[a]n offer of early retirement may constitute constructive discharge if the employee demonstrates each choice facing the employee makes him worse off, and if he refuses the offer and decides to stay, his employer will treat him less favorably than other employees because of age.” Id. at 993.

The court noted that the plaintiffs were pressured into accepting the early retirement buy-out due to Sears’ threats that they would be fired or transferred into positions with higher pressures and unreachable quotas if they decided to remain employed. In addition, the employees were “worse off” under Sears’ early retirement option because the employees lost a substantial amount of benefits to which they would otherwise be entitled.

23. Rowell v. Bellsouth Corp., 433 F.3d 794 (11th Cir. 2005) (employee not constructively discharged where he had choice of selecting VSP or taking chance of finding another job in the company).
However, it is not undue pressure or coercion for the employer to inform employees about the financial condition of the company, the likelihood of future force reductions, or the fact that there is a risk they could be laid off later if they decide not to accept the VSP. Courts have repeatedly held that the fact that an employee’s decision was difficult does not mean that it was coerced. The employer is entitled to give employees objective information about the circumstances of the company and the possible consequences of their choice. However, it should not appear that employees were given a choice between taking the VSP or being fired. Such a “take-it-or-you’re-fired” choice would probably vitiate the element of voluntariness.

The employer should give employees other information it believes is necessary for each employee to make an informed choice, for example, all specific details of the program, benefit information, retirement options, effect on savings and similar plans, the purpose of the reduction program, the reason particular groups were selected for the VSP, opportunities for transfer or future re-employment. The employer should instruct all management personnel that any information or comments must not be given or made in a threatening or coercive manner.

§ 13:3.2 Early Retirement Programs (ERPs)

Another commonly considered alternative to involuntary termination, designed to provide a benefit to older workers, is a voluntary early retirement package for eligible employees.

[A] Legal Considerations

There are numerous legal issues involved in the implementation of an “open window” retirement plan. The major employer concerns regarding voluntary early retirement plans, however, are issues arising under ERISA and the tax laws (issues beyond the scope of this chapter), and the potential for violations of the ADEA. Although the creation of early retirement incentive plans has general judicial approval, illegal age discrimination may result from the method by which the employer implements a plan.

The ADEA issues raised by a voluntary open window retirement plan tend to fall into two categories: (1) whether age may be used as a criterion for plan eligibility and as a factor for determining the level of benefits; and (2) whether the election of early retirement is truly voluntary. These issues will be discussed in turn.


[B] Age As a Criterion of Plan Eligibility and Benefits

Situations arise where age discrimination claims are based upon intra-protected class distinctions made by an employer. Selecting a target group of protected employees on a basis other than age is permissible where such choice is justified by business or other objective considerations. For example, a plan may be offered only to certain overstaffed facilities, divisions or departments. In addition, an employer may target for early retirement a group of under-performing employees so long as nondiscriminatory criteria are applied and care is taken to ensure that the retirement decision is truly voluntary. Early retirement packages may be offered to such employees under an established plan or on an individually negotiated basis. However, employees eligible for early retirement must not be pressured into making a decision and must be given sufficient time and information in order to make an informed and voluntary choice.

[C] Voluntariness

The following factors have been considered by courts in determining voluntariness:

(a) The circumstances surrounding the offer, including:
   • the period of time allowed for the decision
   • details provided about the plan
   • whether a suggestion to consult with an attorney or other advisor was made
   • whether the employee had an opportunity to negotiate the terms of his early retirement;

(b) The information provided to the employee concerning:
   • the likelihood of future involuntary layoffs or terminations
   • the objectives and purpose of the RIF program
   • the reason particular departments, jobs or employees were targeted for the program
   • opportunities for future reemployment with the company or transfers within the company; and

(c) Miscellaneous factors:
   • employee knowledge of prior poor performance
   • informal communications from supervisors.
Further, the EEOC has suggested a number of factors that it considers to be significant in determining whether an open-window plan was coercively administered. These factors require an employer to:

- provide accurate information about the plan and related benefits;
- provide honest information about job prospects with the company to the best of its knowledge;
- allow sufficient time for the employee to make an intelligent decision; and
- assure employees that they are free to decline the offer.\(^{26}\)

If employers follow the above guidelines, the “voluntariness” surrounding an early retirement plan should be upheld if questioned.

\section{§ 13:3.3 Potential ERISA Liability for Misrepresentation of or Failure to Disclose Future Enhanced Retirement Packages or Benefits}

Employers should be aware of the risk of liability for fraud under the common law or breach of fiduciary duty under ERISA if they fail to give necessary information about probable enhanced retirement benefits or packages in the near future. For example, in Rodowicz v. Mass. Mutual Life Ins. Co., 279 F.3d 36 (1st Cir. 2002), a number of retired employees alleged that they were induced to retire in the months before a Voluntary Termination Program was offered that provided for larger severance in addition to the regular retirement benefits. Although the court recognized that the employer could be held liable under Massachusetts law if the it had made misrepresentations regarding the future benefits, it held that there was no evidence that the company had any intention at the time of the allegedly false statements of proposing or implementing an enhanced benefits package. \textit{Id}. at 49.

In addition, under ERISA, an ERISA fiduciary has a duty to disclose a potential change in benefits only in response to a specific inquiry by an employee and only where the change is under “serious consideration.”\(^{27}\) Serious consideration exists only where “(1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change.”\(^{28}\)

\begin{itemize}
\item 27. \textit{See}, e.g., Bins v. Exxon Co. U.S.A., 22 F.3d 1042, 1048–49 (9th Cir. 2000) (en banc).
\end{itemize}
§ 13:4 Planning for a Reduction in Force

Employers must carefully plan and implement a RIF to minimize the risks of litigation and liability discussed above. The RIF program and discussion which follows is suggested with the understanding that it should be modified to meet the needs of each particular company. In addition, one caveat needs to be made—no plan exists that can totally insulate an employer from suit as a result of even the most legitimate layoff.

§ 13:4.1 Establish Corporate Justification for RIF

Every employer contemplating a RIF should keep in mind that it may be called upon to justify its RIF decision in court. Thus the first step a company should take is to identify with reasonable precision its reason for reducing its workforce.

In addition to establishing a business need, an employer should also be prepared to demonstrate that the means and methods followed in its RIF are logical and consistent. For example, in Sorosky v. Burroughs Corp., 826 F.2d 794 (9th Cir. 1987), the employer was able to show that only employees possessing needed skills were transferred to alternate divisions. Id. at 803. This evidence helped the employer to prevail in showing that it had a legitimate and nondiscriminatory reason for laying off the older plaintiff while transferring younger employees to other divisions.

§ 13:4.2 Practical Considerations for Implementing a Reduction in Force

Substantial effort must be invested in preparing for an involuntary workforce reduction. Depending on the size of the company, employers should consider assigning separate individuals or task forces to deal with each aspects of planning for and implementing a RIF. But no matter the company size, employers conducting RIFs should consider the following steps to help reduce or defend potential claims and provide employees greater transparency and a greater sense of fairness.

**Step 1—Planning**

This task involves analyzing the reasons for the need to reduce a workforce including the need to cut costs, increase efficiency and profitability, potential impending merger, acquisition, or other corporate reorganization pressures. The extent of the staffing reductions should be ascertained with reasonable precision, and implementation leaders should be identified.

---

29. See Sorosky v. Burroughs Corp., 826 F.2d 794 (9th Cir. 1987).
Step 2—Communication and Documentation

This step includes communications among organizational leaders during planning and implementation, and also frank and open communications with employees once the organizational plan has been developed. Documentation designed with transparency in mind will aid an employer to convince the fact finder of its lack of discriminatory intent with regard to termination decision.

Step 3—Job Analysis and Position Identification

This task involves analyzing the positions to be eliminated with an eye towards minimizing post-RIF legal exposure.

Step 4—Supervisory Training

This task involves training or providing guidance to supervisors in the metrics and methods to be used for selecting persons for reduction.

Step 5—EEO Oversight

This requires individuals who are knowledgeable in EEO and related matters to be responsible for reviewing practices and procedures to be followed in the RIF; analyzing expert opinion on statistical data for adverse impact; reviewing individual selections for bias, and directing investigation of any problem cases.

Step 6—Out Placement and Employee Training

An additional task of training and out placement of employees may also be considered, depending on the size of the company and the size of the group to be laid off.

See Appendices 13A–I for sample notices, procedures, and guidelines for carrying out reorganizations.

[A] Workforce Analysis and Demographics

An important early step in any large RIF is to look at the demographics of the existing workforce in anticipation of conducting an analysis based on race, sex, and age distribution. The age analysis should not be limited to “under” versus “over” age forty. Various age brackets within the over-forty group should be analyzed, such as forty to forty-nine, fifty to sixty, over sixty, etc. In addition to analyzing the entire company, or whatever segment is subject to the RIF program, employers should consider obtaining statistics by division or department, job groups, and by salary grades. Employers with written affirmative action plans can do this more easily, because existing work-force and job-group analyses provide a database with which to work.

In addition to the pre-RIF workforce analysis, similar data should also be assembled for the post-RIF workforce. This data will be important for doing an adverse impact analysis.
Special care must be taken in preparing and using work-force analyses. Legal counsel should be involved. Employers should recognize, however, that merely seeking legal advice before implementing a RIF plan will not automatically preclude a finding of willful discrimination if they cannot demonstrate a good faith intent to comply with the law.

[B] Management Training

Numerous management personnel are usually involved in a RIF including executive-level management, personnel staff and line supervisors. All management personnel likely to participate in the RIF should be aware of the reason for the RIF as well as the procedures for implementing it. If necessary, management should be trained to ensure consistent and fair administration of the program. In addition, supervisors should be given guidance in the methods and procedures for identifying jobs and ranking employees. Individuals may also require training in communicating the RIF program to employees, in understanding their reactions, in advising and counseling them, and in effecting the actual termination.

[C] Notification to Employees

Once an employer has decided to implement a RIF, it is possible that the word will spread and employees will become apprehensive and demoralized. The company may, therefore, prepare to inform all employees of the financial problem, of steps previously taken to alleviate the problem, and of the fact that the company is now analyzing where it can reduce personnel. All such communications should be made by top management to ensure consistency of message and to assure employees that any RIF will be carried out fairly. Of course, many companies prefer to leave notification to the affected and the

30. Some courts have required an employer’s statistical analysis to be turned over to employment discrimination plaintiffs in pretrial discovery. For example, in Abel v. Merrill Lynch & Co., 1993 U.S. Dist. LEXIS 1213 (S.D.N.Y. Feb. 3, 1993), the court rejected the employer’s argument that the statistical and demographic analyses it prepared as part of a firm-wide RIF were protected from discovery under the self-critical analysis privilege. See also Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal. 1992) (concluding that the employer must turn over notes from its in-house diversity training session conducted by the employer to determine why women and minorities were receiving fewer promotions than white males); but see Flynn v. Goldman, Sachs & Co., 1993 U.S. Dist. LEXIS 12801 (S.D.N.Y. 1993) (reports prepared for employer by outside consultant regarding sex discrimination issues were protected from discovery under self-critical analysis privilege).


32. See Appendices 13E–I.

33. See Appendix 13D, Sample Corporate Policy Statement.
unaffected until the selections have been made in order to avoid mass apprehension among employees. The employer must also determine if WARN notification requirements apply.34

[D] Selection of Employees for Retention

[D][1] General

An early task in any RIF is to determine which jobs or job functions are going to be combined or eliminated.35 Sometimes this is clear from the nature of the economic downturn. For example, a particular contract or line of work may be lost, which affects only one or two departments or facilities. This can happen to businesses even in a healthy economy. In times of a general economic downturn, however, the need for cuts may involve numerous departments or even extend throughout the company. The company will want to identify each affected area and examine the positions in each area for their relative current and prospective value. Once the positions are identified, individual employees can then be evaluated to determine who will be asked to leave, transfer, or stay.

[D][2] Jobs and Their Relative Value

The company should carefully analyze the affected jobs. The focus should be on present jobs and their value to the company’s business, both now and in the future (this may include both near-term and long-term, depending on the level or need for research and development or other operations involving special skills or long lead times). For example, assembly or accounting functions may be easy to replace and remobilize in the event of an upturn. Skilled technical, engineering, or research functions, however, may not only be hard to replace, but the value of the research arm to the company may be too great to sacrifice, even in tight economic times. Management will want to consider whether the proposed reductions meet the company’s goals both for the RIF and for continued operations; that is, a percentage reduction in jobs or cost, total consolidation or elimination.

[D][3] Evaluation and Relative Ranking of Employees

[D][3][a] Performance Evaluations Generally

Managers should now be prepared to rank or rate comparable employees. The company must focus carefully on this process, because this is an area in which bias or unfairness frequently arises. Management should ensure that

34. See section 13:5 infra.
35. See Appendix 13E, Sample Reorganization Guidelines for Management.
employee evaluations or documents dealing with employee evaluations are as free from bias as possible. For instance, in Thomas v. Eastman Kodak Co., 183 F.3d 38 (1st Cir. 1999), the First Circuit reversed summary judgment against an African-American plaintiff who claimed she was selected for layoff as a result of earlier performance evaluations that were racially biased. In particular, the court noted that there was evidence that the plaintiff received excellent performance reviews until a new supervisor came in who gave observably favorable treatment to plaintiff’s white coworkers.

Moreover, breakdowns occur in the implementation of even the most carefully prepared plans, which often lead to employee complaints, even if the bottom-line decisions prove to be correct. For this reason, it is not enough simply to design a good plan; every step of the implementation of the plan must be given sufficient monitoring to insure that it stays on track. Managers must be made fully aware of the substantial liability arising from discrimination suits especially when “smoking guns” exist.

Courts tend to give careful scrutiny to evaluation criteria to determine if bias actually exists. A court will also examine whether the articulated standards were the actual standards or whether they merely concealed some underlying prejudice. In Rose v. Nat’l Cash Register Corp., 703 F.2d 225 (6th Cir. 1983), for example, the company claimed the plaintiff employee was selected for termination because of continuous substandard performance based on his failure to meet quotas for new sales. Employee witnesses testified, however, that in actuality, revenue quotas (amounts received from a combination of existing accounts and new sales) had been stressed by the company as a measure of performance and that the plaintiff had consistently met revenue quotas.

Typically, the laid-off older or minority worker will claim that he or she was laid off while a younger or non-minority worker was retained to do work for which the older worker was qualified. Since this constitutes a plaintiff’s prima facie case, the company would then have to make some showing that the younger worker was, in fact, more qualified. Ratings and reviews that are unbiased, consistent, properly administered and job-related are the best way to meet the company’s burden.36

The importance of basing an adverse employment decision on all the available facts is illustrated by Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393 (3d Cir. 1984). As part of a 15% RIF, the four oldest and most highly paid salesmen in a particular district office were terminated. One of them was plaintiff Duffy, a fifty-nine-year old employee with twenty-five years service. The Third Circuit affirmed the district court’s decision that plaintiff was

---

36. See Beaird v. Seagate Tech., Inc., 145 F.3d 1159 (10th Cir. 1998) (finding evidence that certain performance evaluations were manipulated to support employee’s job loss).
discharged because of his age. It regarded the company’s explanation of poor comparative job performance as pretextual because the plaintiff’s prior performance evaluations had not been reviewed, the manager most knowledgeable about his performance had not been consulted, and the two younger salesmen who were retained had not been evaluated before the cutbacks.

[D][3][b] Evaluation Criteria

Consistent job-related guidelines should be developed by the human resources department for evaluating employees. The more objective the job-related criteria, the less likely a court will find bias. Subjective criteria are permissible in evaluations, but employers should attempt to maintain consistency and formality in the evaluations. For example, an employer’s observations that an employee lacks inner drive, exhibits less creativity and initiative, or shows greater loyalty were all permissible considerations.

Consideration should also be given to what role length of service or seniority will play, if any. Obviously, in union jobs, the collective bargaining agreement will govern. Where no union contract or other company policy governs, however, the company can choose the effect to give seniority, for example, decide to disregard it entirely, to have it govern among all employees in the same job classification, or to have it control when related employees are substantially equal in the other criteria, such as skill and ability.

Regardless of the criteria selected by the company to use in rating employees, including job tenure if applicable, such criteria must be applied uniformly throughout all areas and by all persons involved.

40. See also Steger v. Gen. Elec. Co., 318 F.3d 1066 (11th Cir. 2003) (ADEA defense verdict supported by evidence of limited transferable skills, problems with communications and interpersonal relationships); Malewski v. Nationsbank of Fla., 978 F. Supp. 1095 (S.D. Fla. 1997) (“mere existence of a totally subjective ranking system” does not, by itself, prove employer’s reason for decision to be pretextual).
41. Further, where a union is involved in the layoff decision based on a collective bargaining agreement, the union may be held liable for claims arising from the layoffs. For example, in Rodolico v. Unisys Corp., 189 F.R.D. 245 (E.D.N.Y. 1999), the court held that the employer had a right to seek contribution from its former employees’ union for age discrimination claims under the New York Human Rights Law (NYHRL) where the union and the employer negotiated a layoff provision which called for layoffs by seniority with certain “protected” categories. The employer argued that, to the extent the union breached its duty of fair representation in negotiating the layoff provision, the union was jointly liable for any finding of discrimination under the NYHRL. The court agreed, holding that under the NYHRL’s “aiding and abetting” clause and the contribution provisions of the New York CPLR, the employer’s claim against the union could proceed.
Existing Versus New Evaluations

Employee evaluations may exist already and in most cases such evaluations should be factored into the RIF formula. In some instances, however, an employer may want to consider preparing a “RIF evaluation.” This approach might be appropriate in the following circumstances: First, historical performance reviews were more likely prepared for use in salary adjustments, as morale builders, or possibly with no more concern by the rating official than merely satisfying a mechanical requirement imposed on managers by the personnel department. Managers are often less candid in performance reviews than they could be. Periodic reviews are also frequently prepared in the abstract without attempting a comparison or relative consideration of similarly situated employees, whereas the determination of who to terminate during a RIF will necessarily involve comparison of all employees in the relevant areas.

Employers should be cautioned, however, that historical performance evaluations should not be used in the retention selection process if they have not been conducted regularly. In Duffy, evidence that performance evaluations had not been conducted for several years weighed in favor of the court’s conclusion that plaintiff’s alleged “poor performance” was a contrived story created after the decision to eliminate him had been made on a discriminatory basis.

Clearly, if the fresh evaluation is at variance with prior evaluations, the evaluator should be questioned as to the basis for the change.

Comparative Employee Ranking

Not only must employees in affected areas be evaluated, they must also be compared to one another where appropriate and ranked for retention accordingly. Any variance presents a difficult problem for employers to defend. Employees may be ranked for retention or termination in light of particular present needs or the potential for changed needs in the future.

Additionally, employers should consider whether to rank employees with somewhat similar job titles and/or duties together, rather than ranking small groups individually. For example, in Huff v. Uarco, Inc., 122 F.3d 374 (7th Cir. 1997), plaintiffs were demoted from their positions as supervisors after twenty-four and thirty-two years of service. In raising their ADEA claims, the court found there to be a genuine issue of pretext because while plaintiffs were only

42. See Appendix 13I, Oversight Analysis Worksheet.
43. See, e.g., Doby v. Jones & Laughlin Steel, Inc., 624 F. Supp. 874 (W.D. Pa. 1985) (plaintiffs were ranked prior to RIF to determine those least necessary for continued operations); Ruth v. Allis Chalmers, 40 Fair Empl. Prac. Cas. (BNA) 1227 (W.D. Ky. 1986), aff’d without opinion, 820 F.2d 405 (6th Cir. 1987) (company was not required to transfer or retrain senior employee and could establish RIF plan which considered plaintiff’s lack of recent product familiarity).
ranked among supervisors in their own department, their duties were shown to be interchangeable with those of supervisors in four other departments, which cast suspicion of the employer’s claim that it was simply trying to retain the best supervisors.\textsuperscript{44}

\textbf{[E] Oversight}

Throughout the RIF program, the managers implementing the program should be in constant communication among themselves, with counsel, and with the organizational leaders to assure that the RIF is proceeding according to plan and that any problems have been analyzed, investigated and resolved.\textsuperscript{45} It is particularly important that both individual personnel decisions and the resulting work-force statistics be reviewed for possible claims of liability.

\textbf{[E][1] Workforce Analysis}

As described above, the company should have analyzed its pre-RIF work-force demographics early on in the RIF process. Once the company has made tentative decisions regarding positions and individuals to be eliminated, the appropriate personnel, including decision makers, should conduct a relevant statistical analysis. Legal counsel should be involved, both to assess the outcome and also to bring the review process within the ambit of attorney-client or work product privilege. The review should focus on possible patterns or statistically significant differences in the selection rates of women, minorities and older workers.\textsuperscript{46} This review should be done by company, division, or department as may be appropriate.\textsuperscript{47}

If adverse impact is identified, the RIF program and persons selected should be carefully reviewed to insure that no systemic bias was involved in the selections. In addition, consideration should be given to whether the criteria used in making selections were, in fact, job-related and well documented. Decisions of individual managers should also be reviewed for bias or unfairness. After conducting such a review, it may be necessary to reconsider either the system or particular selections.

Even if no statistical or pattern problem is evident, employers should also look at any “red flag” issues; that is, any situation that appears to present a

\textsuperscript{44} See also Beaird v. Seagate Tech., Inc., 145 F.3d 1159 (10th Cir. 1998) (finding that “[w]hen an employer’s RIF criteria include job categorization, an employer must explain the basis for that categorization or risk a finding of pretext”).

\textsuperscript{45} See Appendix 13F, Model Schedule of Reorganization Activities.

\textsuperscript{46} Employers may use the 80\% rule and also look at pattern data. RIFs involving large numbers of affected employees, however, should use more sophisticated tests for statistical significance. Employers should consult with counsel or a statistical expert to determine the appropriate analysis.

\textsuperscript{47} See, e.g., Cronin v. Aetna Life Ins. Co., 46 F.3d 196 (2d Cir. 1995).
possible claim under applicable federal or local law (for example, affected individuals are on leave due to pregnancy, worker’s compensation injury, have complained about safety or discrimination, or have an outstanding EEO complaint). While these issues do not preclude terminating the employee’s employment, they do warrant even greater care. In such instances, the employer should consult with counsel.

[E][2] Evaluation of Jobs/Employees

Separate and apart from reviewing the overall statistical impact, it may be necessary to review the underlying job evaluations and employee performance ratings to see whether they fall along any gender or racial lines. For example, do white or male employees tend to receive higher performance evaluations than minorities and women and if so, why? Similarly, within particular target areas where employees are ranked, the company may consider reviewing the relative rankings—including discussing them with the supervisors who made them—to ensure that they have been done fairly and consistently. These additional reviews coupled with the relevant statistical analysis will help identify areas where plaintiffs might seek to show systemic bias in any particular employee selection.

[E][3] Thorough Review of Individual Problems

Either through the above review process, or because of a complaint brought to the attention of management, particular problems may surface. Each problem should be dealt with promptly and appropriately. Many employees are likely to say, “Why me?” Supervisors should be trained in answering that question or in referring the individual to the appropriate person to answer it.

Even if the employee does not expressly articulate a claim of bias (or a claim of breach of some oral or written assurance of continued employment, etc.), investigation of any complaint by an employee of unfair treatment should include an exploration of all potential forms of discriminatory or other unlawful treatment. It would be unwise for management to ignore potential problems simply because the employee does not specifically raise them. Employers must remember that in RIFs, particularly in tight economic times, the severance of an individual’s employment is a traumatic experience. Laid off employees are more likely to be desperate because this is the most severe of personnel actions. The likelihood is real, therefore, that the employee will seek counsel from someone who can better articulate his or her complaint.

48. Id.
A key feature in the procedure for handling any employee who leaves the company, whether voluntarily or involuntarily, is an exit interview. Any employees who leave should be interviewed by a pair of management officials (where possible, one of the interviewers should be someone from the personnel department). The departing employee should be questioned on an open-ended basis regarding his or her feelings about the company, treatment received, supervisors, work, and terms and conditions of employment. The employee should be specifically asked about any problems he or she has encountered, the reason(s) for leaving, or, if the termination is involuntary, reactions to the reason(s) given for the termination. Employees should also be asked to sign the exit interview. Statements by interviewing officials should be short and to the point, and they should avoid gratuitous comments.

Although characterized as post-RIF actions, decisions about the following possible actions should be included in the planning step, well thought out, and in place at the time the actual RIF takes place:

• outplacement (professional organization, informal contacts, etc.);
• retraining;
• recall rights, if any; and
• severance benefits.

While post-layoff benefits and active employer assistance in seeking alternate employment create goodwill among employees and in the community, employers should be aware of potential legal ramifications of post-termination programs and benefits. For example, company recall policies may be considered implied contractual rights. In addition, if not extended to all terminated employees on a nondiscriminatory basis, job-seeking assistance may itself be the source of discrimination claims.

Another issue to consider is what kinds of claims may be waived by employees in exchange for severance packages or other incentives. Federal law claims are generally waivable. An exception is made for a waiver of claims under the Fair Labor Standards Act. Disputes over FLSA coverage may generally not be compromised without Department of Labor involvement. Subject to these, and other limited state law exceptions, releases are generally enforceable as long as they are knowing and voluntary, and provide consideration such as extra pay or benefits above and beyond what the employee would normally be entitled to under the circumstances of the separation.
Claims under the ADEA, however, are subject to a much stricter standard. Congress enacted the OWBPA in 1990, in order to prevent employers from taking advantage of older workers by securing unfair or improper releases of claims under the ADEA. To accomplish this, the OWBPA sets forth strict procedural and substantive requirements that must be met to obtain an enforceable ADEA release.

[A] General Waiver Requirements Under the OWBPA

The OWBPA requirements seek to insure that waivers of age discrimination claims are “knowing and voluntary.” 29 U.S.C. § 626(f)(1). The OWBPA expressly provides that, in order for a release to be deemed knowing and voluntary under the OWBPA, the waiver must:

1. be part of a written agreement that is readily understandable by the employee;
2. refer specifically to claims under the ADEA;
3. not encompass future ADEA claims;
4. be given in exchange for consideration that is over and beyond any benefit to which the employee is already entitled;
5. provide in writing that the employee is advised to consult with an attorney before signing the waiver; and
6. give the employee adequate time to consider the waiver before signing it. In the case of an individual termination, the employee must be given twenty-one days to consider the waiver. In the case of an exit-incentive or other employment-termination program offered to a group of employees, at least forty-five days must be given. In either case, the employee has seven days after signing in which to revoke the waiver. However, in the case of settlement of court proceedings or settlements with the EEOC, “a reasonable period of time” to consider the waiver is acceptable.

7. in the case of a group exit-incentive program, also disclose in writing:
   (a) the groups of employees eligible for the program;
   (b) the program requirements;
   (c) any time limitations under the program; and
   (d) the job titles and ages of all employees eligible or selected for the program and the same information for those not eligible or selected.
See 29 U.S.C § 626(f)(1). Set forth below is a discussion of the regulations and case law interpreting/supplementing the express terms of the statute.

[B] “Knowing and Voluntary” Requirement

In addition to the requirements outlined in the statute and regulations, if there is a material mistake, omission, or misstatement in the content of the waiver, the waiver may not be considered to have been “knowing and voluntary.” See 29 C.F.R. § 1625.22(a)(3). The EEOC has not defined the term “materiality” in its discussion accompanying the final rules, and defers to the existing law regarding the analysis of the word. However, the material error need not be intentional or relied upon by the employee in order to invalidate the waiver agreement.

“[N]onstatutory circumstances such as fraud, duress, or coercion in connection with the execution of the waiver may render an ADEA waiver not ‘knowing or voluntary.’” Griffin v. Kraft Gen. Foods, Inc., 62 F.3d 368 (11th Cir. 1995). Griffin’s failure to define “fraud, duress, or coercion” in an ADEA context suggests common law criteria apply without regard to statutory requirements. It is worth noting, however, that legislative history bars “coercion” from being defined as an inducement to leave with a release.

[C] Wording of Waiver Agreement

The statute provides that a waiver must be part of an agreement between the individual and the employer and it must be written in a manner calculated to be understood by such individual, or by the average individual eligible to participate. 29 U.S.C. § 626(f)(1)(A). The EEOC’s regulations clarify this requirement by providing that:

1. the entire waiver agreement must be in writing. 29 C.F.R. § 1625.22(b)(2);
2. to make the waiver agreement comprehensible, an employer must consider the comprehensive abilities and education level of the individual party to the agreement, or of the average individual eligible to participate. Technical jargon and long, complex sentences should be avoided. 29 C.F.R. § 1625.22(b)(3); and
3. the waiver must clearly and accurately describe its advantages and disadvantages without exaggerating either. It cannot be misleading or misinforming to participants. 29 C.F.R. § 1625.22(b)(4).

Employers must make sure the language in the agreement is not confusing, ambiguous or self-contradicting. For example, in Thomforde v. IBM, 406 F.3d 500 (8th Cir. 2005), the Eighth Circuit found that an ADEA release was invalid
under the OWBPA because it contained ambiguous language. In particular, IBM’s agreement contained both a “waiver” section in which the plaintiff specifically released IBM from all claims, including under the ADEA, and also a “covenant not to sue” that stated “[t]his covenant not to sue does not apply to actions based solely under the [ADEA].” According to the Eighth Circuit “one plausible reading of the document reveals that the employee releases IBM from all ADEA claims and agrees not to institute a claim of any kind against IBM, except the employee may bring an action based solely under the ADEA.” Id. at 503. Noting this ambiguity, and the fact that IBM had declined to clarify it when requested by plaintiff, the Eighth Circuit found that the language was “not written in a manner calculated to be understood by the intended participants as required by the OWBPA.” Id. at 504. The Ninth Circuit reached the same conclusion in a case involving essentially identical language. Syverson v. IBM, 472 F.3d 1072, 1087 (9th Cir. 2007) (“Agreement does not satisfy the ‘manner calculated’ requirement of the OWBPA, was not ‘knowing and voluntary,’ and cannot be enforced”).

[D] Specific Referral to Rights or Claims

The statute, at 29 U.S.C. § 626(f)(1)(B), and the EEOC’s regulations, at 29 C.F.R. § 1625.22(b)(6), require that the waiver must specifically refer to the ADEA by name.

[E] Waiver of Future Rights

An individual may not waive rights or claims that may arise after the date the waiver is executed. 29 U.S.C. § 626(f)(1)(C), 29 C.F.R. § 1625.22(c)(2). The EEOC, in its discussion of comments on this section, provides that rights regarding new acts of discrimination following the signing of the agreement cannot be waived, and the right to file a charge with, or participate in an investigation by, the EEOC may not be waived. However, the regulations clarify that enforcement of agreements to perform future employment-related actions, such as an agreement that the employee will retire on a future date, is not barred. 29 C.F.R. § 1625.22(c)(2).

[F] Consideration

An individual can only waive rights or claims in exchange for “consideration in addition” to which the individual is already entitled. 29 U.S.C. § 626(f)(1)(D). “Consideration in addition” is defined by the EEOC as anything of value in addition to that which the employee is already entitled to in the absence of a waiver, and need not be “substantial.” 29 C.F.R. § 1625.22(d)(2); § 1625.22(d)(3). Note that an employer is not required to provide a person above the age of
forty greater consideration than someone below forty solely because of that person’s membership in the protected class. 29 C.F.R. § 1625.22(d)(4).

However, an employer may not eliminate a benefit or other thing of value in contravention of law or contract (as to that individual employee or a group of employees), and subsequently offer such a benefit in connection with a waiver to fulfill the “consideration” requirement of the subsection. The EEOC maintains that the determination of whether the elimination is in contravention of law or contract to the employee must be made on a case by case basis. 29 C.F.R. § 1625.22(d)(3).

An employer’s offer of $1,000 as a post-judgment settlement of employee’s discrimination claims was found not to be adequate consideration in EEOC v. Johnson & Higgins, 5 F. Supp. 2d 181 (S.D.N.Y. 1998). The waivers were signed after the court found the employer liable, therefore, the district court reasoned, the employees were already entitled to the amount of award for backpay and damages in the lawsuit. The court also found that the employees could not have knowingly and voluntarily agreed to the $1,000 amount, as the EEOC valued their claims at approximately $3 million each.

[G] Consultation with Attorney

The EEOC regulations echo the statute and provide that an individual must be advised in writing to consult with an attorney prior to signing the agreement. 29 U.S.C. § 626(f)(1)(E). However, the courts have determined that this advice must be specific and written in the initial agreement, and the actual consultation must assist the employee in understanding the agreement.

In Am. Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998), the only written reference to the employee to consult legal counsel was contained in the release executed at the time the employee left the company. The employees acknowledged having read the release on the Voluntary Early Retirement Program (VERP) election form prior to making their decision. *Id.* at 117. The release stated, “I have had reasonable and sufficient time and opportunity to consult with an independent legal representative of my own choosing before signing this Complete Release of All Claims.” *Id.* at 118. While the American Airlines court affirmed the dismissal of plaintiff’s claims because they were untimely filed with the EEOC, it found that the release was insufficient to satisfy the requirement under section 626(f)(1)(E), because it did not specifically state that the employee was *advised* to consult with an attorney. The statement that the employee had the opportunity to consult with an attorney failed to “directly advise their employees to consult a lawyer” prior to signing the agreement. *Id.*

A court has also held that, where the employee did consult with an attorney, that the consultation with the attorney must specifically concern the agreement
and whether the employee should sign it. See Haswell v. Marshall Field & Co., 16 F. Supp. 2d 952 (N.D. Ill. 1998). The court in Haswell denied summary judgment to defendants and found a question of fact as to the validity of a contractual waiver of ADEA claims under 29 U.S.C. § 626(f)(1)(E), despite the employee’s consultation with an attorney prior to signing the waiver agreement. The employee’s sister-in-law, an attorney, contacted the employer about a miscalculation of the plaintiff’s severance pay, looked over the Release and Agreement, sent a letter to the senior vice president of human resources on behalf of Haswell, and had ample time to discuss with the employee whether she should sign it. Haswell, however, maintained that Mott was not consulted as an attorney, but rather as a “concerned family member who was attempting to determine the reasons for Haswell’s abrupt transfer and termination from her long-term employment.” Id. at 958–59. Further, the senior vice president of human resources was unaware that Mott was an attorney during their conversations concerning Haswell. In addition, Mott did not use her legal expertise to assist Haswell in understanding the agreement and had no knowledge of the employer’s pressure on Haswell to sign the agreement. Id. Based on the above facts, the court found a material issue of fact as to whether the release was executed in a “knowing and voluntary” manner, “regardless of whether Mott was technically acting as Haswell’s attorney.” Id.

[H] Time Periods

[II][1] Time to Consider Agreement

An individual must be given at least twenty-one days to consider the agreement. 29 U.S.C. § 626(f)(1)(E)(i) In connection with an “exit incentive or other termination program” offered to a group or class of employees, the individual must be given at least forty-five days to consider the agreement. 29 U.S.C. § 626(f)(1)(E)(ii). The twenty-one-day or forty-five-day period runs from the date of the employer’s final offer. A material change in the offer restarts the time period; non-material changes do not. The parties, however, can agree that changes, regardless of the type, will not restart the running of the time period. 29 C.F.R. § 1625.22(e)(4). The EEOC declined to define “material,” pointing to existing law for the definition of “materiality.”

An employee may sign a release prior to the end of the twenty-one-day or forty-five-day period, thereby commencing the seven-day revocation period. The early signing of a release, which shortens the twenty-one-day or forty-five-day period only, must be executed knowingly and voluntarily by the employee; it cannot be obtained by an employer’s fraud or misrepresentation, threat to withdraw or alter the waiver offer, or promises of better deals to employees who sign early. The amount of time before an employee receives the compensation can be shortened in exchange for a waiver. 29 C.F.R. § 1625.22(e)(6).
If an employer wishes to revoke the agreement during the twenty-one-day period, it may do so. Ellison v. Premier Salons Int’l, Inc., 164 F.3d 1111 (8th Cir. 1999). The twenty-one-day review period is relevant only to the issue of whether an employee’s waiver of rights was knowing and voluntary. It does not constitute an irrevocable power of acceptance. Id. at 1115; see also Marks v. N.Y. Univ., 61 F. Supp. 2d 81, 89 (S.D.N.Y. 1999) (same).

The twenty-one-day period applies only to the decision of whether to sign the waiver, not to the decision of whether to accept a termination program. Blackwell v. Cole Taylor Bank, 152 F.3d 666, 670 (7th Cir. 1998). The fact that the employees were given less than one day to decide whether they would quit or transfer to new positions does not shorten the statutory minimum of twenty one days. Id.

The employer must provide the employee with the required information at the time of the initial agreement, prior to the start of the forty-five-day period the employee may consider the agreement. In Tung v. Texaco, Inc., 150 F.3d 206 (2d Cir. 1998), the employer failed to comply with the OWBPA because it provided the employee with the required age-based information only after the employee had signed the release. Even though the employee was given more than the OWBPA-required forty-five days to consider the release, the waiver was invalid since the information was not provided “at the commencement of the [forty-five-day] period” that the employee is given to consider the waiver. Id. at 209.

[H][2] Time to Revoke Release

After signing the agreement, the employee must be given a period of at least seven days within which the individual may revoke the agreement. The agreement shall not become effective or enforceable until the revocation period has expired. 29 U.S.C. § 626(f)(1)(G). While the twenty-one-day or forty-five-day consideration period may be shortened by an early signing of the waiver, the seven-day period cannot be shortened by an agreement of the parties. 29 C.F.R. § 1625.22(e)(5).

This period gives the employee time to reconsider a possibly hasty waiver of rights.

The seven-day revocation period applies to the release of the ADEA claims only, not to the termination agreement itself. Reid v. IBM Corp., 1997 U.S. Dist. LEXIS 8905 (S.D.N.Y. June 24, 1997). The court found that the employee signed an irrevocable Departure Commitment Agreement, which rendered the employee’s decision to leave the company final. However, the power to revoke the decision to release claims against the employer remained intact for the full seven-day period, meeting the OWBPA requirement under section 626(f)(1)(G). 1997 U.S. Dist. LEXIS 8905, at *15.
Special rules apply to group exit-incentive programs. In particular, the OWBPA provides that a waiver is not knowing and voluntary unless “in connection with an exit incentive program or other employment termination program offered to a group or class of employees, the employer [at the required time of notice] informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to

1. any class, unit or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

2. the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.


**Exit Incentive or Other Employment Termination Programs**

A “program” exists when an employer offers additional consideration to two or more employees in return for the signing of a waiver pursuant to an exit incentive or other employment termination (for example, reduction in force). 29 C.F.R. § 1625.22(f)(1)(iii)(B). “Exit incentive programs” are usually voluntary programs offered to a group or class of employees where the employees receive consideration, in addition to what they are already entitled, in exchange for their voluntary resignation and execution of a waiver. 29 C.F.R. § 1625.22(f)(1)(iii)(A). An exit incentive program is typically a standardized formula or package of benefits not subject to negotiation and designed to induce employees to sever their employment voluntarily. 29 C.F.R. § 1625.22(f)(1)(iii)(B).

“Other employment termination programs” refers to a standardized formula or package of benefits available to a group/class of two or more employees who were involuntarily terminated and who are offered additional consideration in return for signing a waiver. 29 C.F.R. § 1625.22(f)(1)(iii)(A), (B). Thus, a separation agreement that is not individually tailored but is “part of a standardized package of benefits offered in a program targeted at a group of employees” will be considered part of a termination program under the OWBPA. Suhy v. Allied Signal, 44 F. Supp. 2d 432, 434 (D. Conn. 1999).

A program is within the statute when it creates an incentive to leave. Blackwell v. Cole Taylor Bank, 152 F.3d 666 (7th Cir. 1998). “An outright termination is merely the extreme case of creating an exit incentive.” Id. at 669. The court defined “offer” not as providing the employee with a choice as to discharge, but rather allowing the employee to choose the severance offer that is
conditioned on a waiver of rights. The Blackwell court also found that offering employees the option between resigning and a three month trial period in a new position constituted an exit incentive program:

When an employer tells you you’re not doing an adequate job and gives you a choice of either quitting on the spot or “trying out” as it were for another job and offers you severance payments if you quit either now or in three months, it is creating—or so a trier of fact might rationally find—an incentive to quit.

Id. at 668. Though it affirmed summary judgment for the defense on lack of evidence of age discrimination, the court held that the employer’s offer could reasonably be deemed an exit incentive program, requiring that employees be given a minimum of forty-five days in which to consider the offer. Id.

[1][2] Organizational Unit, Defined

“Class,” “unit,” “group,” and “job classification or organizational unit” are each examples of a category/grouping of employees which can be affected by an exit incentive or other employment termination program and who must be informed in detail about such offerings. The EEOC regulations advise that these categories are “determined by examining the ‘decisional unit’ at issue.” These categories are not to be treated as an exclusive list and are to be evaluated on a case-by-case basis. Each of these “decisional units” includes the portion of the employer’s organizational structure to which an employer chooses to offer consideration in return for a waiver (it includes both those employees to whom the offer was extended as well as those for whom the offer was considered but not extended). The decisional unit is supposed to “reflect the process by which an employer chose certain employees for a program and ruled out others from that program.”

A decisional unit can cover several “groups” of employees and generally does not encompass the employees at more than one facility (for example, a plant, school, or complex). The decisional unit can, however, be larger than one facility if terminations were considered among multiple facilities and then occurred at only a specific facility. 29 C.F.R. § 1625.22(f)(3).

The particular circumstances of each termination program determine the decisional unit. Higher level review of a termination decision will only change the breadth of the decisional unit if changes are made to the scope of the review. For example, if the regional manager and a subordinate jointly review the termination decision by taking into account more than one facility, the decisional units become the populations of all facilities considered. 29 C.F.R. § 1625.22(f)(3)(v),(vi).

The regulations state that a decisional unit may be other than the entire facility in the following circumstances:
1. A number of small facilities with interrelated functions and employees in a specific geographic area may comprise a single decisional unit;

2. If a company utilizes personnel for a common function at more than one facility, the decisional unit for that function (that is, accounting) may be broader than the one facility;

3. A large facility with several distinct functions may comprise a number of decisional units; for example, if a single facility has distinct internal functions with no employee overlap (that is, manufacturing, accounting, human resources) and the program is confined to a distinct function, a smaller decisional unit may be appropriate.


Employers must be very careful to satisfy all of the informational disclosure requirements or else the release will likely be held invalid. In Ruehl v. Viacom, Inc., 500 F.3d 375 (3d Cir. 2007), the employer failed to attach the required demographic information to the release or adequately inform the employee of how to find or request it. In invalidating the release, the court strictly applied the OWBPA’s requirement that employers seeking releases “inform the individual in writing” of the demographic information listed in section 626(f)(1)(H). Here, the employer never provided the employee the information, nor mentioned that the information was available upon request, or provided directions for how to obtain the information, and therefore the waiver was therefore not knowing and voluntary under the OWBPA.

In Pagliolo v. Guidant Corp., 483 F. Supp. 2d 847 (D. Minn. 2007), the court certified an age discrimination class action brought by former employees who had signed ADEA releases. The court found that the releases were invalid under the OWBPA for because the release documentation contained material misrepresentations, failed to describe the affected decisional unit with

49. The EEOC regulations provide a few non-inclusive examples as an aid in determining the appropriate decisional unit:

- **Facility-wide**: Ten percent of the employees in the Springfield facility will be terminated within the next ten days.
- **Division-wide**: Fifteen of the employees in the Computer Division will be terminated in December;
- **Department-wide**: One-half of the workers in the Keyboard Department of the Computer Division will be terminated in December.
- **Reporting**: Ten percent of the employees who report to the Vice President for Sales, wherever the employees are located, will be terminated immediately;
- **Job Category**: Ten percent of all accountants, wherever the employees are located, will be terminated next week.

29 C.F.R. § 626(f)(1)(iii).
particularity, failed to disclose the eligibility factors, and ignored regulatory formatting requirements with respect to disclosing the ages and job titles of the affected employees. For example, the court found that the employer made material misrepresentations to the affected employees in a way that made it appear that there were 10% fewer terminations of employees forty and older. The employer improperly described the decisional unit as nearly all United States-based employees, and improperly aggregated numerous facilities from six different corporations into a single decisional unit. Overall, the court concluded that the employer made it unreasonably difficult for employees to determine whether they might have an age discrimination claim, and therefore the signed releases were invalid for purposes of waiving future ADEA claims. Id.

In Burlison v. McDonald’s Corp., 455 F.3d 1242 (11th Cir. 2006), the court held that McDonald’s complied with the “decisional unit” disclosure requirement when it provided terminated employees with information regarding their respective regions rather than the nationwide group of employees.

In Griffin v. Kraft Gen. Foods, Inc., 62 F.3d 368 (11th Cir. 1995), an employer was found to have violated the disclosure requirements of the OWBPA in failing to provide employees dismissed in a plant closing with information about ages and job classifications from a pool of the employer’s four similar plants. The employer did not provide a list of “the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program” because no employee would be left after the plant shutdown. However, the court found that “individuals in the same ‘job classification or organizational unit’ may include employees at other plants in the same company.” Griffin construed the OWBPA requirement as geographically unrestricted, and the statutory listing of ages of ineligibles must be read in context of the legislative purpose to permit older workers to make more informed decisions in group termination and exit incentive programs. The court reasoned that the purpose of the information requirement is to allow the terminated employees to determine whether the work was spread to more youthful employees elsewhere. The Griffin court held that determining whether the releases were knowing and voluntary is a two step process: it must meet the specific OWBPA requirements as well as the federal common law rule of “totality of the circumstances.”

It is an issue of fact under Griffin whether “individuals in the same job classification or organizational unit” can include employees outside a single facility. Id. at 372. The Griffin court determined that comparative information must include the ages of employees at other plants that are not closed when a company may have considered for closure several plants producing similar products, and employees at other plants may assume the functions of the closed plant’s employees in making these products. The court could easily conceive of a
unit that would span more than one plant, given the different types of organization structures in business. “To limit individuals in the same ‘job classification or organizational unit’ to a single plant would be to read the statute’s words contrary to their naturally broad meaning and to insert an exception where none is written.” *Id.*

In *Adams v. Moore Bus. Forms, Inc.*, 224 F.3d 324, 329 (4th Cir. 2000), the employer was found to have disclosed sufficient information in a plant closing even though it excluded age and job title information from its other facilities that remained open. The court determined that there was insufficient evidence to show that the employer “actually considered” employees at the other plants for layoffs, and, therefore, the decisional unit was properly confined to the single plant that was shut down.

In an attempt to demonstrate that the employer did consider layoffs or plant closures at the other facilities, the plaintiffs testified to the following: the employer transferred equipment from the closed plant to the other facilities; approximately six months prior to the plant closing, the employer instituted an incentive program which tied raises to plant production; and the employer allegedly informed its employees that the incentive program was a “competition to see which plants [would] stay open and which plants [would] close.” *Id.* However, the court concluded that this evidence was “speculative,” and the plaintiffs failed to show that the equipment transfer demonstrated that the employer was considering layoffs at the other facilities. Nor did the plaintiffs show any connection between the incentive program and the plant closing.

Failure to identify the decisional unit accurately in the notice will invalidate the release. In *Kruchowski v. Weyerhauser Co.*, 446 F.3d 1090 (10th Cir. 2006), the Tenth Circuit invalidated a release agreement that inaccurately identified the decisional unit for a reduction in force of employees working at a mill. The court found that the release was invalid, in part, because the group termination notice provided to the plaintiffs erroneously identified the decisional unit as all salaried employees at the entire mill, when in fact the relevant decisional unit was a smaller group of employees reporting to the mill manager. The court held that because “the information provided did not meet the strict and unqualified requirement of the OWBPA, the Release is ineffective as a matter of law.”

**Eligibility Factors**

The OWBPA also requires employers to inform employees affected by a group termination about “any eligibility factors for such program.” 29 U.S.C. § 626(f)(1)(H)(1). The EEOC regulations provide an illustration that suggests that this requirement may be met simply by stating that all terminated employees were eligible for the program: “All persons in the Construction Division are
eligible for the program. All persons who are being terminated in our November RIF are selected for the program.” 29 C.F.R. § 1625.22(f)(4).

Presentation of Information

Categorization of Employees

The EEOC provides some guidelines as to how to present the required information to employees. Particularly, when information regarding employee ages is provided, it should be categorized by those who were eligible or selected for the program and those who were not eligible or selected; by age bands no broader than one year; by position, grade level, or other subcategory within a job category or title; and by voluntary and involuntary terminations. 29 C.F.R. § 1625.22(f)(4).

The determination of whether the categorizations of a particular disclosure is “understandable to the average worker” must be decided on a case-by-case basis. Raczak v. Ameritech Corp., 103 F.3d 1257, 1263, reh’g en banc denied, 1997 U.S. App. LEXIS 6346 (6th Cir. 1997), cert denied, 522 U.S. 1107 (1998). In examining a case where the employer categorized its required information based on age and salary grade, the Raczak court found that the terms of “job title,” “job classification,” and “organizational unit,” need to be defined on a case by case basis with an eye to the purpose of the OWBPA to be sure workers had the ability to assess the value of the right to sue for a possibly valid discrimination claim.

The Raczak court established criteria for determining whether an employer had satisfied the disclosure requirement of the OWBPA. The non-exhaustive factors to consider in determining if the information is “understandable to the average worker” are whether:

1. prior to the layoffs, the company used its proffered titles and classifications in its work processes;
2. whether the titles and classifications were used in assessing or choosing workers for layoffs; and

50. The Tenth Circuit had previously held that the eligibility factors, at least with respect to a waiver sought as part of an involuntary reduction in force, refers to the factors considered in selecting employees for termination. Kruchowski v. Weyerhauser Co., 423 F.3d 1139 (10th Cir. 2005). This portion of the opinion, however, was subsequently withdrawn. Kruchowski, 446 F.3d 1090 (10th Cir. 2006).
3. whether the titles and classifications were meaningful to the average worker in his or her understanding of the workplace and the layoff process.

The court explained that the purpose of the inquiry is to “focus on the question of understandability to a worker who is trying to assess whether age discrimination actually occurred, and trying to assess what the prospects of a suit would be, whether or not discrimination actually occurred.” Id. at 1264. Depending on the factual situation of the organization, a salary grade or a hierarchical level may be the most meaningful description in accordance with the OWBPA.

The information provided to the employee must clearly show the ages of those not included in the separation package and whether they were in the same job classification or organizational unit as those who were. Branker v. Pfizer, Inc., 981 F. Supp. 862 (S.D.N.Y. 1997). In Branker, the court found that the information provided to the employee did not fulfill the “calculated to be understood” requirement of the OWBPA. The information given to the employees did not match job titles with work units or ages, and did not specify the number of terminated employees in each work unit. Information about the ages of individuals not offered the separation package was provided as “ages 23 through 67, excluding ages 40, 50, 55, 59, 60, 63, 66.” Id. at 867 n.3. The court found that this method of giving information was obscure, and the employee was unable to derive the ages, job classification, or organizational unit of those not included in the separation package. Id. at 867.

Scope of Disclosure

The regulations also provide some guidelines as to the scope of disclosure. An employer must disclose the information of the entire population of a decisional unit, even if those terminated were selected from a subset of that unit. Additionally, if an involuntary termination takes place over time, the information supplied to terminated employees should be cumulative so that later terminatees receive information on all persons in the decisional unit from the beginning of the terminations to the present date. 29 C.F.R. § 1625.22 (f)(4)(v),(vi).

Other Requirements Under OWBPA

Waivers Settling Charges or Lawsuits

A waiver in settlement of a charge filed with the EEOC or an action filed in court against the employer must meet the standards as set out in the OWBPA, with the exception of the time period requirement. In the case of settlement with the EEOC or court proceedings, the individual needs only be given a “reasonable amount of time” to consider the waiver. 29 U.S.C. § 626(f)(2).
The regulations define “reasonable time” to mean reasonable under all the circumstances, including whether the individual is represented by counsel or has the assistance of counsel. While the time periods concerning separation agreements do not apply to waivers settling charges or court proceedings, the time periods required for valid separation agreements will be considered “reasonable” for purposes of settling charges or court proceedings. 29 C.F.R § 1625.22(g)(5).

A waiver agreement that is a settlement of an EEOC charge does not require EEOC participation or supervision. 29 C.F.R § 1625.22(g)(6).


If a waiver is challenged legally, the waiver serves as an affirmative defense with the burden on the employer to prove in court that the waiver is valid. 29 U.S.C. § 626(f)(3).

[3] EEOC’s Enforcement Power

No waiver agreement may include a provision “imposing a condition precedent, a penalty, or any other limitation adversely affecting an individual’s right” to file a charge or complaint, including a challenge to the validity of a waiver agreement, with the EEOC, or participate in an investigation or proceeding conducted by the EEOC. 29 C.F.R § 625.22(h)(i)(3).

In its discussion of the proposed comments to this section of the regulations, the EEOC states that this language renders void any requirement in a waiver agreement that an individual tender back the consideration before filing a complaint against the employer or assisting the EEOC in an investigation. See infra section 13:4.3[K][2], “Tender Back.”

[4] EEOC Regulations on ADEA Waivers

Based on an arguably expansive reading of the United States Supreme Court decision in Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998), the Equal Employment Opportunity Commission has issued regulations effective January 10, 2001, that concern waivers under the ADEA. Specifically, the EEOC has set forth additional guidelines it believes employers must comply with when asking older workers who are voluntarily or involuntarily terminated from their employment to accept payments or other benefits in exchange for waiving their rights under the ADEA.

Although the regulations are not the “law of the land” insofar as they are subject to interpretation by the courts, as a practical matter the regulations are significant because they emphasize the EEOC’s interest in ensuring that ADEA waivers are consistent with the OWBPA, an interest that will most likely be magnified given the current economic climate in which reductions in force—and the offer of waivers to force-reduced employees in return for severance
payments—may occur more frequently. In other words, while legal arguments may be made concerning the EEOC’s seemingly broad interpretation of Oubre set forth in the regulations, it is likely that if employers’ ADEA waivers fail to comply with the OWBPA’s requirements, the EEOC will aggressively enforce the regulations with respect to the noncompliant waivers.

[K][1] No Ratification of Waiver by Employee’s Retention of Severance Payments

In Oubre, the release procured by the employer did not comply with the OWBPA in at least three respects:

1. the employer did not give Oubre enough time to consider her options;

2. the employer did not give Oubre seven days after she signed the release to change her mind; and

3. the release made no specific reference to claims under the ADEA.

522 U.S. at 840. The Court held that a release, such as the one at issue, that does not meet each of the requirements of the OWBPA may not be ratified by the employee’s failing to return, upon commencement of a lawsuit, payments received in consideration for the waiver. In so holding, the Court noted that “[t]he [OWBPA] creates a series of prerequisites for knowing and voluntary waivers and imposes affirmative duties of disclosure and waiting periods. . . . The rule proposed by the employer [that an employee who retains the monies paid for the release ratifies the release] would frustrate the statute’s practical operation as well as its formal command.” Id. at 841–42. In other words, to enforce the contract principle of ratification might “tempt employers to risk noncompliance with the OWBPA’s waiver provisions, knowing it will be difficult to repay the moneys and relying on ratification.” Id. at 842. The Court—and the EEOC via its regulations—refused to “open the door to an evasion of the statute by this device.” Id.

[K][2] “Tender Back”

The EEOC regulations address another central holding of the Oubre decision; that is, contrary to general contract principles, an older worker cannot be required to “tender back” (return) severance payments as a condition to filing suit under the ADEA based on an allegedly invalid waiver. According to the Supreme Court and the EEOC, a tender back requirement would, as a practical matter, prevent older workers—many of whom often need the retirement or severance payments to live on and may have already spent the payments on living expenses—from challenging waivers that were not valid under the OWBPA. Although the Supreme Court did not go so far in its holding, the EEOC states that any provision in a waiver agreement, even an agreement that
meets all the OWBPA requirements, but which requires an employee to tender back consideration received as a condition to pursuing an ADEA claim otherwise waived would be unlawful. The EEOC further states that an older worker may retain severance or other benefits even if he or she challenges the validity of a waiver agreement under the ADEA. 29 C.F.R. § 1625.23(a).

[K][3] Restitution/Set-Off

Although the Supreme Court left the issue open, the EEOC regulations provide that an employer may recover money it paid for a waiver if an older worker successfully challenges the waiver, proves age discrimination, and obtains a monetary award. The EEOC states, however—in a point not addressed by the Supreme Court and thus, potentially subject to future judicial interpretation—that the employer’s recovery must be limited to the lesser of: (1) the amount it paid for the waiver to begin with; or (2) the amount of the award to the prevailing ADEA plaintiff. Id. § 1625.23(c).

[K][4] Covenants Not to Challenge Waiver

According to the EEOC regulations, covenants not to challenge a waiver under the ADEA are the functional equivalent of a waiver in that older workers give up the right to sue for age discrimination under the ADEA and therefore, such covenants are subject to the OWBPA requirements and restrictions. Id. § 1625.23(b). Employers thus must be careful in drafting covenants not to sue so that employees understand that the covenants do not affect their right to test in court the knowing and voluntary nature of the agreements themselves under the OWBPA.

Further, the regulations expressly prohibit the requirement generally associated with covenants not to sue under common law—that, if a lawsuit is brought, the lawsuit filer will pay damages and attorneys’ fees to the defendant—because according to the EEOC, like the tender back rule, requiring the payment of such monetary remedies would undermine the OWBPA’s legislative purpose insofar as these remedies would stop most older workers from challenging ADEA waivers. However, the waiver may provide that in the event of an unsuccessful challenge to the validity of the waiver, the employee may be held liable for the employer’s attorneys’ fees to the same extent that successful defendants are allowed attorneys’ fees under the ADEA. Generally, the ADEA requires a showing that the plaintiff prosecuted the unsuccessful challenge in bad faith before a court may award attorneys’ fees to the defendant.

[K][5] Abrogation

The regulations further state that an employer may not abrogate or avoid the duties to which it agreed under a waiver agreement, covenant not to sue or other equivalent arrangement, even if one or more of the signatories or the EEOC
successfully challenges the validity of the agreement. Thus, although not addressed by the Supreme Court in *Oubre*, the EEOC states that an employer remains legally obligated to continue to make the retirement, severance, or other payments it agreed to provide to the older worker, even after the employee commences litigation challenging the validity of the waiver. *Id.* § 1625.23(d); See also *Butcher v. Gerber Prods. Co.*, 8 F. Supp. 2d 307, 317 (S.D.N.Y. 1998) (employer could not cut off severance benefits or demand repayment of benefits because employee had commenced a lawsuit in breach of employee’s release).

**[K][6] Cure of the Defective Release**

As matter of law and public policy, an employer is allowed only one chance to conform to the requirements of the OWBPA. In *Butcher v. Gerber*, supra, the court held that Gerber did not and could not as a matter of law cure a defective release by issuing a letter to the employees containing OWBPA-required information that was omitted from their separation agreements and requesting that the employees either “reaffirm” their acceptance of or “revoke” the release. The court noted that the statutory language of the OWBPA is silent as to whether employers could have more than one opportunity to satisfy the requirements of the OWBPA and construed this silence as an indication that Congress did not intend to allow employers to cure defective waivers. *Id.* at 319. The court then explained that:

If the statute were to allow employers two or more “bites of the apple,” an employer could put off compliance indefinitely. It could obtain waivers from older workers without complying with the OWBPA in the hopes that the employees would not commence a timely ADEA action. If such an action were then commenced, as it was in this case, the employer could simply “comply” at that time and then raise the defense of release and waiver.

*Id.*

Finally, the court explained that Congress enacted the ADEA and OWBPA with the intention of creating incentives for companies to obey the law. *Id.* at 319. The court pointed out that the OWBPA was intended to “ensure[ ] that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA.” *Id.* Gerber’s noncompliance with the OWBPA, whether deliberate or unintentional, was not proper under the OWBPA. *Id.*

The court noted that even assuming, *arguendo*, that the release could be cured, the letter did not meet the requirements of the OWBPA because it offered no additional consideration to the discharged employees, and thus, it failed to comply with the OWBPA’s requirement that waivers must be given in exchange for consideration. *Id.* The court also found that the letter:
1. failed to inform the discharged employees that they could do nothing and continue to receive benefits;

2. failed to inform the discharged employees that the information supplied in the letter was required by the OWBPA; and

3. incorrectly stated that the release was binding.

Id. at 320–21. Accordingly, the court granted the motion for summary judgment and struck Gerber’s affirmative defense of waiver.

It is notable that the court did not differentiate between deliberate and unintentional failures to comply with the OWBPA. Although not clearly articulated in its decision, the Gerber court appears to have believed that Gerber’s failure to comply with the OWBPA was intentional, and that was a crucial factor driving the court’s decision. The court may have reached a different conclusion had Gerber’s cure attempt been made prior to the commencement of the class action.

[K][7] Invalid Waiver As a Separate Cause of Action


In contrast, another court has held that an invalid waiver can be an independent cause of action under the ADEA. Commonwealth of Massachusetts v. Bull HN Info. Sys., Inc., 1998 16 F. Supp. 2d 90 (D. Mass. 1998). In Bull, an employer’s severance plan provided that if an employee who executed a release later brought or maintained a claim covered by the agreement he or she would be required to return all severance paid and must indemnify the employer for all attorney’s fees, costs and expenses associated with defending the complaint or claim. An action was brought against the employer solely based on the invalidity of the waiver.

The Bull court found that the broad enforcement scheme articulated in section 626(c) covers the waiver requirements of section 626(f). “If Congress sought to preclude independent enforcement of the waiver conditions—and limit the remedy in the way that some cases have done . . . it would have either said so explicitly or placed the OWBPA in a different part of the statute.” Id. at 105. The court explained its view by pointing to the purposes of the OWBPA, to protect the interest of older workers who were vulnerable in waiving their rights to bring ADEA claims against their employers. The court found that by not allowing for an independent cause of action under section 626(f), “employers
could functionally insulate themselves from ADEA suits and ignore the waiver provisions of the OWBPA simply by including a drastic penalty provision in the waiver.” *Id.* at 106. This, the court found, was directly contrary to the intent of Congress in enacting both the ADEA and the OWBPA provisions.

**[K][8]** Effect of Invalid Waiver on Timeliness of ADEA Suit

Withdrawal of an EEOC charge conditioned on an invalid waiver does not trigger the limitation period after which suits alleging an ADEA claim are barred. *Hodge v. N.Y. Coll. of Podiatric Med.*, 157 F.3d 164 (2d Cir. 1998). In *Hodge*, an employee filed a charge of age discrimination with the EEOC before his termination, and later signed a settlement agreement, invalid under the OWBPA, in which he would be employed for one more year in exchange for releasing his employer from liability under the ADEA and withdrawing his EEOC charge. When his final year of employment ceased, the employee filed suit alleging his employer violated the ADEA. In reversing the district court’s dismissal of the complaint as untimely, the court of appeals found that withdrawal of the EEOC charge pursuant to an invalid agreement is not a bar to suit on an ADEA claim, and that the withdrawal cannot trigger the ninety-day limitations to preclude any future suit once the period has expired. *Id.* at 167.

The court reasoned that allowing such a withdrawal to trigger the ninety-day period would be contrary to *Oubre* and perverse under the OWBPA because it would both give a legal effect to an agreement otherwise invalid under the OWBPA and deny ADEA rights to employees who accept benefits under such an agreement for more than the limitations period. *Id.* The court also held that the employee is not required to refile or reopen the charge with the EEOC to bring the present action, since the EEOC had the charge for more than the minimum period required to investigate or attempt conciliation before the ADEA plaintiff is allowed to file suit in court. *Id.* at 168.

**[L]** OWBPA Requirements Not Applied to Non-Age Claims

Thus far, the courts have not applied the OWBPA requirements to the release of non-age discrimination claims. Thus, it appears that for non-age discrimination claims, the courts will continue to apply the common law “totality of the circumstances” test to determine if the waiver was knowing and voluntary. Under this test, the courts will consider the following factors: the plaintiff’s education, the amount of time the plaintiff had to review the waiver, the clarity of agreement, whether legal assistance was obtained, and whether the plaintiff received greater benefits in exchange for the waiver than entitled to by law. See, e.g., *Torrez v. Pub. Serv. Co.*, 908 F.2d 687 (10th Cir. 1990); *Stroman v. W. Coast Grocery Co.*, 884 F.2d 458, 462 (9th Cir. 1989).
Another issue that should be considered by employers regarding separation agreements is whether such an agreement will be admissible should the employee refuse to sign the agreement and then subsequently sue the employer. In Cassino v. Reichhold Chem., 817 F.2d 1338 (9th Cir. 1987), the employer faced such a situation. In Cassino, the employee refused to sign a “Settlement Agreement and General Release” prior to his termination. Plaintiff eventually filed an ADEA claim against his former employer because he felt he had been replaced by a younger employee.

The Ninth Circuit held that the proffered termination agreement was admissible because it was “relevant to the circumstances surrounding the alleged discriminatory discharge. The termination agreement . . . [is] probative on the issue of discrimination.” Id. at 1342.

The Ninth Circuit did state, however, that if the agreement had been offered regarding an existing dispute, it would not have been admissible pursuant to Federal Rule of Evidence 408, because “the protections of Rule 408 were designed to encourage the compromise and settlement of existing disputes.” Id. The court was adamant, however, that “Rule 408 should not be used to bar relevant evidence concerning the circumstances of the termination itself simply because one party calls its communication with the other party a ‘settlement offer.’” Id.

§ 13:5 Worker Adjustment and Retraining Notification Act (WARN)\(^52\)

In addition to concerns flowing from Equal Employment Opportunity laws, employers considering a RIF must also consider their obligations under the

---

52. Both the House (H.3662) and the Senate (S.1792) have introduced the Forewarn Act of 2007. The proposed Act seeks to expand WARN to redefine the terms “employer,” “plant closing,” and “mass layoff” for purposes of the Act to, among other things, make the Act applicable to employers of fifty or more employees (under current law, 100 employees); expand the notice period to ninety days (under current law, sixty days); extend the available penalties through the ninety-day notice period; alter the definition of “mass layoff” to cover layoffs of at least twenty-five employees who account for one-third of an employer’s workforce (current law defines “mass layoff” to cover layoffs of at least fifty to 499 employees who account for a third of the workforce); and allow the labor secretary or state attorney general to file a civil action on behalf of employees. The Senate referred bill 1792 to the
The WARN Act arose out of a number of highly publicized plant closings that in some instances had a dramatic impact on entire communities.

The basic requirement of the WARN Act is simple: Employers should, whenever possible, give sixty days’ notice to workers and local union officials before closing a plant or laying off workers en masse. Advance notice to workers and their families allows transition time to adjust to the prospective loss of employment, to seek and obtain other jobs, and if necessary, to enter skill training or retaining that will allow these workers to compete successfully in the job market. Employers who do not comply will face fines and civil liability.

Implementing WARN, even after interpretation by the DOL in its regulations, is difficult and should be approached with great caution by employers and their counsel. As The U.S. Department of Labor (issued interpretive regulations on April 20, 1989, stated:

In practical terms, there are some questions and ambiguities of interpretation inherent in the application of WARN. . . . It is therefore prudent for employers to weigh the desirability of advance notice against the possibility of expensive and time-consuming litigation to resolve disputes when notice has not been given.  

§ 13:5.1 Who Must Give Notice

The WARN Act applies to all profit and nonprofit enterprises, and to governmental agencies engaged in a commercial enterprise, that employ: (a) 100 or more employees (not including any part-time employee), or (b) 100 or more employees who in total work at least 4,000 hours per week, excluding overtime.


55. Before a penalty may be applied, however, a plaintiff must demonstrate that the defendant is an “employer” responsible for the employment loss. 29 U.S.C. § 2102(a). In Coppola v. Bear Stearns & Co., 499 F.3d 144 (2d Cir. 2007), the Second Circuit held that Bear Stearns, a creditor, was not an employer of appellants because they were not responsible for operating the business as a going concern. Rather, under the test articulated by the Eighth and Ninth Circuits, Bear Stearns merely acted to protect its security interest and preserve the business assets for liquidation or sale. In Chauffeurs, Sales Drivers, Warehousemen & Helpers Union, v. Weslock Corp., 66 F.3d 241 (9th Cir. 1995), the court held that a secured creditor could be subject to WARN’s
The regulations state that the number of employees is to be measured on the date the notice is required to be given, but if that number is “clearly unrepresentative” of employment figures for the enterprise because of seasonal or other fluctuations, then a more representative number—such as the average number of employees over a recent period—may be used. Also, the regulations state that independent contractors and subsidiaries may be treated as separate employers depending on their degree of independence from the contracting or parent company. The degree of independence is determined by factors including:

1. common ownership,
2. common directors or officers,
3. de facto exercise of control,
4. unity of personnel policies emanating from a common source, and
5. the interdependency of operations. 

obligations, but only if “the creditor operates the debtor’s asset as a business enterprise in the ‘normal commercial’ sense.” Id. at 244. When, however, the creditor “does no more than exercise that degree of control over the debtor’s collateral necessary to protect the security interest and acts only to preserve the business asset, the notice requirement of WARN will not apply.” Id. See also Adams v. Ervin Weller Co., 87 F.3d 269, 272 (8th Cir. 1996) (only when a lender becomes so entangled with its borrower that it has assumed responsibility for the overall management of the borrower’s business will the degree of control necessary to support employer responsibility under WARN be achieved). But see Pearson v. Component Tech Corp., 247 F.3d 471 (3d Cir. 2001) (applying traditional DOL factors for co-employer liability to lenders).

56. Compare Administaff Cos. v. N.Y. Joint Bd., 337 F.3d 454 (5th Cir. 2003) (Administaff not liable for decision by a plant owner to close plant where Administaff employees worked because (1) Administaff had nothing to do with ordering or implementing the closing, and (2) Administaff was not a joint employer under the DOL standards because the employees did not actually perform services for Administaff, there was no common ownership, no shared management, and Administaff was not involved in operations of plant), with Childress v. Darby Lumber, Inc., 357 F.3d 1000 (9th Cir. 2003) (lumber mill company and construction company were joint employers under DOL standards with respect to plant closing where both companies’ employees worked because of common ownership, common directors, de facto control of one organization by the other, and dependency of operations).
§ 13:5.2 Mass Layoffs and Plant Closings Under WARN

[A] Plant Closing Defined

A covered plant closing occurs when a facility or operating unit is shut down for more than six months, or when fifty or more employees lose their jobs during any thirty-day period at a single site of employment (not including part time employees). The regulations state that an “effective cessation” of production or work at a site of employment will be considered a shutdown even if a few employees remain.

[B] Mass Layoff Defined

A mass layoff is defined by the WARN Act as a reduction in force, not due to a plant closing, that results in an employment loss at a single site of employment of (1) at least one-third of the employees at the site equaling at least fifty people, or (2) at least 500 employees (even if that is less than one-third of the employees at the site). This means that reductions in force resulting from a merger, acquisition or consolidation may be covered by WARN. Part-time employees are excluded from the calculation.

The WARN Act notice requirements do not apply where the government forces an employer to undertake a mass layoff.57 The WARN Act also does not apply to a closure of temporary facilities, or the completion of an activity when the workers were hired only for the duration of that activity. The WARN Act further provides for less than sixty days’ notice when the layoffs resulted from closure of a faltering company, unforeseeable business circumstances, or a natural disaster.

[C] Single Site of Employment Defined

The regulations attempt to define the term single site by use of a “geographical” test that focuses on the physical layout of the workplace. Groups of structures in one industrial park are said to be single site. Even entirely separate structures can be a single site if they are in “reasonable proximity” with one another, and share the same staff and equipment.

The Tenth Circuit in Frymire v. Ampex Corp., 61 F.3d 757 (10th Cir. 1995), held that the regulations suggest that “proximity and contiguity are the most important criteria for making single site determinations.” However, the Tenth Circuit also stressed that the presumptions established by the “proximity and contiguity factors” can be defeated or reinforced by the “operational,

57. Deveraturda v. Globe Aviation Sec. Servs., 454 F.3d 1043 (9th Cir. 2006) (plaintiffs laid off due to federalization of airport security not entitled to WARN Act notice).
managerial, and labor variables.” Using such factors, the Tenth Circuit found that two manufacturing plants located 150 feet apart were each “single sites of employment.” The court made this finding by stressing the following factors:

1. generally separate management;
2. the absence of common employees between the two separate wholly-owned subsidiaries of the defendant parent corporation; and
3. the two plants produced distinct products.

Recently, the Ninth Circuit in Bader v. N. Line Layers, Inc., 503 F.3d 813 (9th Cir. 2007), held that employees who were geographically dispersed among remote construction sites, often located in other states, were not covered by the WARN Act because none of their sites were close enough to aggregate together to create a single employment site. Further, relying on DOL regulation section 639.3(i)(6), the court found that the number of construction workers at remote sites could not be aggregated with the number of headquarters employees in Billings, Montana, because the construction workers were not “outstationed” from the headquarters office. The term “outstationed,” according to the court, most logically connotes a situation where employees live for a short period at a certain site, and depart for home when the work is done. The remote contractors here, by contrast, were generally not residents of Montana, and therefore did not consider it their home.

The court observed that other courts often look directly to the regulation’s three definitions of the “single site of employment” in order to decide whether a group of employees qualifies. However, even after examining these definitions, the court still concluded that the plaintiffs had not demonstrated that Billings meets any of the criteria for assignment. Plaintiffs did not demonstrate that Billings was:

1. the site to which workers were assigned as their home base;
2. the site from which work was assigned; or
3. the site to which the workers reported.

Bader at 819; see 20 C.F.R. § 639.3(i)(6); cf. Teamsters Local Union 413 v. Drivers, Inc., 101 F.3d 1107, 1110 (6th Cir. 1996) (“This subpart is written in the disjunctive: any one of the alternatives may qualify as the definition of ‘single site.’”).

58. 20 C.F.R. § 629.3(i)(6).
[D] Part-Time Employee Defined

WARN defines a part-time employee as one who is employed for an average of fewer than twenty hours per week, or who has been employed for fewer than six of the twelve months preceding the date on which notice is required. The regulations state that the period of time is the shorter of the actual time the worker has been employed or the most recent ninety days. 59

[E] Employment Loss Defined

An employment loss includes:

(1) an involuntary termination not for cause,
(2) a layoff of more than six months, and
(3) a reduction in hours of more than one-half during each month of any six-month period.

However, this term is subject to a number of qualifications in the WARN Act. Employment loss does not include a relocation or consolidation if the employer offers to (1) transfer the employee to another site within “reasonable commuting distance” and with no more than a six-month break in employment, or (2) transfer the employee to another site, regardless of distance, with no more than a six-month break, and the employee accepts. Reasonable commuting distance is determined by considering geographic accessibility, the quality of the roads, customarily available transportation, and the usual travel time.

The WARN Act specifically excludes the sale of part or all of an employer’s business from the definition of employment loss. 60 Thus, an employee will not be deemed to have suffered an employment loss in a sale of assets if the successor employer offers him or her employment. 61

59. Note that DOL regulations state, and at least one district court has held, that employees on leave are to be counted as full-time employees, not part-time employees, at the time of the triggering event. 20 C.F.R. § 639.3(a); Teamsters v. Norcal Waste Sys., 2004 LEXIS 18186 (N.D. Cal. Sept. 2004).

60. 29 U.S.C. § 2101(b)(1); Wilson v. Airtherm Prods., Inc., 436 F.3d 906 (8th Cir. 2006); Smullin v. Mity Enters., Inc., 420 F.3d 836 (8th Cir. 2005).

61. In Long v. Dunlop Sports Group Ams., Inc., 506 F.3d 299 (4th Cir. 2007), the Fourth Circuit held that a company that shut down a South Carolina manufacturing plant without warning did not violate the WARN Act because it offered to pay the affected employees for a period of sixty days or until they accepted jobs with a successor firm. The sale and employment transfer must actually occur, however, prior to the plant closing to satisfy this exception. See Phason v. Meridian Rail Corp., 479 F.3d 527, 529 (7th Cir. 2007) (WARN liability attached where employees were plant was closed before sale went into effect, even though most employees were soon rehired by purchaser).
[F] **Losses Must Be Aggregated**

One of the most far-reaching provisions of the WARN Act requires employment losses occurring in two or more groups that, by themselves, do not meet the minimum numbers set forth above, and will be aggregated if those losses occur within a ninety-day period. The employer can escape this provision only if it demonstrates that the losses are “separate and distinct” and are not an attempt to avoid WARN. This means that WARN may apply retroactively to layoffs that, when made, did not require sixty days’ notice, but that trigger the notice requirements when added to subsequent layoffs. Further, any cause of action under WARN does not accrue until the enough employees are terminated to constitute an aggregated mass layoff.62

[G] **Temporary Losses**

If a layoff is announced by the employer to be six months or less but turns out to be longer, it is treated as an employment loss unless (1) the extension of the layoff results from business circumstances that were not reasonably foreseeable, and (2) notice is given at the time the extension becomes reasonably foreseeable.

Care must be taken when converting what was noticed as a temporary closing or layoff into a permanent one. In Graphic Commc’ns Int’l Union v. Quebecor Printing Corp., 252 F.3d 296 (4th Cir. 2001), the employer gave notice in September 1998 of a temporary closing that would last more than six months beginning December 11, 1998. The laid off employees were still entitled to receive certain benefits during the temporary closing. However, on December 15, 1998, the company decided to make the closing permanent effective December 16. As a result, the employees lost a number of benefits, including dental and life insurance and seniority recall rights. The court held that the notice for the earlier temporary closing did not satisfy the notice requirements for the permanent closing.

[H] **Temporary Hire Exception**

WARN does not apply where the plant closing or mass layoff comes at the end of a project, and the affected employees were hired with the understanding that their employment was limited to that project. The regulations provide, however, that it is the employer’s burden to prove that the hire was temporary.

62. This can render a release of claims inapplicable to a subsequent WARN Act claim that arises after the release is executed. See, e.g., Allen v. Sybase, Inc., 2006 U.S. App. LEXIS 26613 (10th Cir. Oct. 2006).
[I] Strike or Lockout Exception

WARN does not apply where the plant closing or mass layoff constitutes a strike or lockout not intended to evade WARN.

§ 13:5.3 To Whom Must Notice Be Given and What a Valid Notice Must Include

[A] To Whom Must Notice Be Given

In particular, the employer must serve notice:

(1) to the authorized union representative for the affected employees,
(2) if there is no union representative, then to each affected employee,
(3) to the state dislocated worker unit, and
(4) to the chief elected official of the unit of local government within which the plant closing or mass layoff is to occur.

The regulations state that, if there is more than one applicable unit of local government (for example, a city and a county), the notice should be given to the unit to which the employer paid the highest taxes for the preceding year.

[B] What a Valid Notice Must Include

The regulations provide some welcome certainty by specifying precisely the contents of the required notice. The requirements vary as to each person or entity entitled to receive notice, but can be summarized as generally including the following:

(1) the name and address of the site of the plant closing or mass layoff,
(2) the nature of the planned action (that is, whether it is a plant closing or a mass layoff, and whether it is expected to be permanent or temporary),
(3) the expected date of the first layoff and the anticipated schedule for making layoffs,

63. In California, the state dislocated worker unit is the Employment Development Department, Job Training Partnership Division, P.O. Box 826880, MIC69, Sacramento, CA 94280-0001, ATTN: Data Tracking Unit. In New York, notice should be sent to the Dislocated Worker Unit Director, New York State Department of Labor, State Office Campus–Bldg. 12, Room 459, Albany, New York 12240.

64. Sample notice forms are attached as Appendices 13A–C.
§ 13:5.4 EMPLOYMENT LAW YEARBOOK 2008

(4) the job titles of positions to be affected, the number of employees in each job classification, and the names of the workers currently holding those jobs,

(5) a statement as to any applicable bumping rights,

(6) identification of union representatives, if any, of the affected employees, and

(7) the name, address and telephone number of a company official to contact for further information.

§ 13:5.4 When Less Than Sixty Days’ Notice Can Be Given

The WARN Act allows for reduced notice for an employer who is faced with unforeseeable circumstances. An employer must nonetheless give as much notice as practicable, and provide a brief statement which includes the reason for reducing the sixty days’ notice period. In a case of first impression, the Ninth Circuit addressed the question of what the employer’s statement must contain to be considered “adequate” under the WARN Act. In Alarcon v. Keller Indus., 27 F.3d 386 (9th Cir. 1994), the court explained that the statement should set forth the underlying factual events which led to the reduced notice period, thus allowing the employees to understand the employer’s situation and its basis for reducing the period. Further, the facts set forth must be “reasonably specific.” It is not enough for the employer to simply state “the notice is short because we are a faltering company.” Such a statement, according to the court, would not provide the underlying condition justifying the shortened notice.

[A] Faltering Company Exception

If the employer is “actively seeking” capital or business that, if obtained, would have avoided or postponed the closing or layoff, and if the employer “in good faith” believes that giving sixty days’ notice would interfere with those efforts, the notice requirement may be reduced. The regulations impose many restrictions on the use of this narrow exception, including that the employer must be able to identify specific actions to obtain the capital or business, that there must have been a “realistic opportunity” to obtain the capital or business, that the capital or business sought must have been enough to avoid the plant closing for a “reasonable period of time,” and that the employer must have “reasonably and in good faith” believed that giving the required notice would preclude the employer from obtaining the capital or business sought.
If the plant closing or mass layoff resulted from business circumstances that were not “reasonably foreseeable” when the notice should have been given, the notice requirement may be reduced. This exception focuses on the employer’s “business judgment” and whether the employer should have anticipated the circumstances giving rise to the plant closing or mass layoff. For example, the defense may apply where the layoff is forced by the sudden and unexpected termination of a client’s contract. The rapid loss of business following negative publicity can also qualify as an unforeseeable business circumstance. However, where factors that should have been foreseeable also contributed to the closing, the exception will not apply. Furthermore, the employer must show that the allegedly unforeseeable circumstances actually caused the layoff.

Another exception is where the plant closing or mass layoff results from a natural disaster such as flood, earthquake or drought. The regulations provide that the employer must be able to demonstrate that the plant closing or mass layoff is a “direct result” of the natural disaster. The regulations state that a plant closing or layoff as an “indirect” result of a natural disaster might fit the “unforeseeable circumstances” exception but would not fit here.

WARN provides for an award of lost wages and benefits to affected employees for the period of violation, which may last up to sixty days. WARN also provides a civil penalty of up to $500 per day for failure to give sixty days’ notice to the local government of a plant closing or mass layoff. There is to be no such penalty, however, if within three weeks of the closing or layoff the employer pays the affected employees the amounts due them under WARN.

In addition, WARN provides for private civil actions in federal court, and includes a provision for attorneys’ fees to the prevailing party. WARN expressly states that it does not authorize an injunction to stop the plant closing or mass layoff. It also includes a clause that allows the court to reduce the liability—or for the employer to avoid liability altogether—if the employer shows that it acted in “good faith” and that it “had reasonable grounds for believing that the act or omission was not a violation.”

[B] Payments in Lieu of Notice

Employers may provide less than sixty days’ notice and avoid WARN penalties if they pay the employees what the employees would have received in wages and benefits during the sixty-day period. In such instances, employees are entitled to be paid only for days they would have actually worked in the sixty-day period. 66 Employers may not use existing severance, vacation, or salary continuation obligations to offset payments under the WARN Act, and the WARN Act payments must be in addition to any compensation to which the employees are already entitled. 67

§ 13:5.6 California WARN Act

On January 1, 2003, Assembly Bill 2957 (contained in sections 1400–08 of the California Labor Code) went into effect, which created a California state law providing notification requirements similar to the federal WARN Act. Although the law requires the same sixty-day notice period as federal WARN, it differs in several key respects.

[A] Labor Code Section 1400 et seq. Applies to More Employers Than WARN Covers

WARN applies only to employers of 100 or more persons, and imposes notice requirements upon employers engaging only in specified types of mass layoffs (of 500 employees, or fifty employees that make up a third of the workforce) or plant closures (affecting fifty or more employees). The new state law, however, applies to an employer with as few as seventy-five persons, which means that much smaller reductions in force will be covered under state law compared to federal law.

Under the state law, a facility is a “covered establishment” when it is an industrial or commercial facility or part thereof that employs, or has employed within the preceding twelve months, seventy-five or more persons. An “employer” includes any person who directly or indirectly owns and operates a covered establishment.

66. See Burns v. Stone Forest Indus., Inc., 147 F.3d 1182 (9th Cir. 1998).
67. See Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep’t Stores, Inc., 15 F.3d 1275 (5th Cir. 1994) (improper to offset severance and vacation pay against WARN Act payments, because severance and vacation payments required by law and would be due regardless of WARN Act’s applicability); Ciarlante v. Brown & Williamson Tobacco Corp., 143 F.3d 139, 152 (3rd Cir. 1998) (severance payments, even where labeled “salary continuation,” are not wages and not subject to offset against WARN Act payments because company was legally obligated to provide them).
A “layoff” means a separation from a position for lack of funds or lack of work, and a “mass layoff” means a layoff during any thirty-day period of fifty or more employees at a covered establishment, regardless of the size of the workforce or the percentage of the workforce affected. (WARN provides that the separation of fifty or more employees, but fewer than 500, constitutes a covered layoff only if the terminated employees constitute at least one-third of the workforce.) A “relocation” means the removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away. “Termination” means the cessation or substantial cessation of industrial or commercial operations in a covered establishment. A layoff will not be found under California WARN, where the employees are merely transferred to another employer with no loss of pay or benefits. MacIsaac v. Waste Mgmt. Collection & Recycling, Inc., 134 Cal. App. 4th 1076, 1091 (2005).

[B] Labor Code Section 1400 et seq. Appears to Cover Parent Companies

In a provision that is sure to raise controversy and result in legal challenges, the law also provides that a “parent corporation is an ‘employer’ as to any covered establishment directly owned and operated by its corporate subsidiary.” Thus, the law appears to automatically “pierce” the corporate veil and impose notice obligations—and liability—upon parent companies when a subsidiary engages in a covered layoff, relocation, or termination.

[C] Absent Extraordinary Circumstances Covered Employers Must Provide Notice of Layoffs, Relocations or Terminations or Face Significant Damages and Stiff Penalties

The law provides that, unless necessitated by a physical calamity or act of war, an employer may not order a mass layoff, relocation, or termination at a covered establishment unless, sixty days before the order takes effect, the employer gives written notice of the order (which complies with the notice requirements of the WARN Act) to the following:

1. The employees of the covered establishment affected by the order.
2. The Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs.

An employer who fails to give notice as required is liable to each employee entitled to notice who lost his or her employment under the same terms as
WARN, that is, up to sixty days of wages and benefits, and for civil penalties of up to $500 per each day of violation.

As under WARN, an employer may be relieved from the notice requirements if it is able to establish that as of the time that notice would have been required, the employer was actively seeking capital or business, which, if obtained, would have enabled the employer to avoid or postpone the relocation or termination, and the employer reasonably and in good faith believed that giving the notice required by the California law would have precluded the employer from obtaining the needed capital or business.

§ 13:6 Conclusion

Frequent economic downturns, coupled with judicial expansion of employee rights, increase the likelihood that terminated employers will seek redress, and that lawyers will be more willing to take their cases. Employers must understand the costs of discrimination must be avoided, but also that fairness, consistency, and reasonableness should be actively pursued. Careful planning and monitoring of RIFs are vital to any successful employment defense. Otherwise, instead of benefiting the employer, the cost savings from a reduction program will be lost in significant legal fees and damage awards.