

How to Control a Reduction in Force

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Reductions in force (RIFs) can lead to expensive and distracting litigation, and potential liability. Unfortunately, in today's economy RIFs may be unavoidable. Nothing can make them entirely risk free, but taking certain steps can reduce the risk. The outline below identifies where the risks lay, and the guidelines describe steps designed to reduce the risk. **Consider Alternatives to a RIF**

- RIFs bring risk. Terminated employees challenge RIFs based on myriad theories: that age, race, gender, national origin, etc. was considered in selecting employees to be RIF'd, or that the RIF disproportionately impacted any of those groups; that the RIF unlawfully precluded benefits under ERISA; that union contracts were breached; that insufficient notice of the RIF was provided to the employees; etc.

- Therefore, to avoid or minimize the liability RIFs can bring, the employer should consider alternatives. These alternatives include, for example:
 - Furloughs and reduction in work (reduced work weeks or workdays)
 - Temporary plant shutdowns
 - Voluntary reverse seniority layoff with partial pay
 - Work-sharing
 - Voluntary reduced pay training programs to increase potential for interplant transfers
 - Use of federal job training assistance
 - Voluntary leaves of absence
 - Salary or bonus freezes; employee sharing of insurance premiums, increased insurance deductible and limited benefit eligibility for newer employees
 - Hiring freezes if attrition is high
 - Terminating a few employees with substantial performance problems
 - Terminating recent hires within their introductory period
 - Discontinuing the use of temporary and part-time employees and redistributing their work
 - Voluntary separation programs and early retirement incentives

Planning for a Reduction in Force Careful planning can minimize the risk of liability arising from a RIF. At a minimum, the employer should:

- Establish a corporate justification for the RIF.
 - Create logical and consistent means and methods for the RIF.
- Establish a special management/human resources committee (including legal counsel) that will draft, implement and monitor the RIF plan.
 - This controls the creation and flow of documentation, and selects decision makers (witnesses) in advance.
- Consider the role of diversity considerations in the RIF.

But be careful: reverse discrimination is unlawful. **Criteria for Selecting Employees for Termination**

- Using subjective criteria is lawful, but using objective selection criteria is easier to defend to a court. It may be difficult to connect subjective criteria to the overall purpose of the RIF, or to justify them in light of performance review results.

- Centralized selection is preferred because it usually leads to more consistent procedures and results.
- Common selection methods: seniority; historical performance evaluations; ranking of employees.
- After employees are selected, but before they are informed, you may want to conduct an analysis to determine whether the selections will disproportionately impact a protected group. If such impact is found, you should consider using different selection criteria.
- Beware of impact on high risk employees, such as those who are on leave or have known health issues; those whom you know are litigious; and the longer-tenure employees.

Make Sure You ...

- Document. Document all aspects of the RIF process, including the business justification for the RIF and consideration of RIF alternatives; analysis of positions to eliminate; and selection criteria.
- Train management. Train all management likely to participate in the RIF on the reason for the RIF and the procedures for implementing it, including the method and procedures for identifying jobs and ranking employees, and communicating with employees regarding the RIF.
- Protect privileged communications with counsel.
- Have a plan for exit interviews. Two members of management and/or HR should be present at every exit interview. Make sure they can deal with distraught employees. Be prepared to inform the terminating employee about: the need for the RIF and the basis of the termination decision; recall/rehire rights; severance and other benefits; post-RIF considerations such as outplacement and re-training.
- Consider post-RIF programs. Programs for outplacement, re-training, and such build good-will, but can create liability if they are not extended equally to all employees.

Releases and Waiver of Claims. Consider providing a separation/severance package or other incentive in exchange for the employee's release of all claims. Note, however, that the validity of such waivers can be problematic. For example, waivers of age discrimination claims are governed by the Older Workers Benefit Protection Act, [29 U.S.C. § 626\(f\)](#), which will invalidate any waiver that does not strictly comply with very specific and sometimes convoluted requirements; and waivers of FMLA and wage (FLSA) claims are invalid without DOL or court approval. See 29 CFR 825.220(d) and *Lynn's Food Store v. U.S.*, 679 F.2d 1350, 1352 (11th Cir. 1982), respectively. You should consult legal counsel if you intend to go this route. **Providing Notice Of The RIF** The federal WARN Act requires employers to provide notice (to affected employees and the state and local government) in advance of covered plant closings and covered mass layoffs. See [29 U.S.C. § 2101, et. seq.](#) Notice generally must be 60 days (although there are exceptions) and rules are strict on what content the notice must include. Typically, violations require payment of wages and benefits to affected employees for the

period of the violation (up to 60 days). Whether your RIF is covered by WARN can be difficult to determine—you should consult legal counsel. **COBRA** Do not forget the affected employees have COBRA rights. Your HR professionals will know what to do.

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