



MAYNARD
NEXSEN

2023 Employment Law Certificate Series

Session 3: RIFs and OWBPA/WARN Compliance

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May 10, 2023

Webinar Overview

- **Reduction in Force (RIF)**

- Voluntary vs. involuntary
- Older Worker Benefits Protection Act (OWBPA) compliance
- Avoiding discrimination

- **Worker Adjustment and Retraining Notification (WARN) Act**

- Triggering events
- Notice provision compliance
- Mini-WARN Acts

PART 1 ///

Reduction in Force (RIF)

2023 Brings an Increase in Layoffs

- On May 1, **FedEx** announced that it will close 29 locations later this year and initiate another round of furloughs at the end of May (initial furloughs occurred in November 2022 and a second round occurred in February 2023).
- Between November 2022 and January 2023, **Amazon** laid off over 180,000 employees. In March the company announced that it would lay off another 9,000 employees.
- **Google** laid off 12,000 employees in January, receiving wide-spread criticism for communicating the layoffs via e-mail to employees.

The FedEx logo, featuring the word "FedEx" in a bold, sans-serif font. The "Fed" is in blue and the "Ex" is in orange.The Amazon logo, featuring the word "amazon" in a lowercase, bold, sans-serif font. A yellow curved arrow underneath the letters "a" and "z" points from the "a" to the "z".The Google logo, featuring the word "Google" in its characteristic multi-colored font: blue "G", red "o", yellow "o", green "g", and red "le".

Consider All Options

- Hiring freeze
- Reduced hours/schedule for existing employees
- Reduced pay for existing employees
- Furloughs
- RIFs



Reduction in Hours and Pay – FLSA and Wage Issues

- Be careful when furloughing exempt employees.
 - Entitled to pay during any workweek in which work is performed.
 - Except for certain limited exceptions, salary deductions result in loss of the exemption
 - Predetermined regular salary reduction due to business or economic slowdown is permissible provided the change is bona fide and not used as a device to evade the salary basis requirements.
 - Deductions from predetermined pay based on day-to-day or week-to-week determinations of the operating requirements of the business constitute impermissible deductions from the predetermined salary and result in loss of the exemption.
 - Pay cannot go below \$684 per week (\$35,568 annually).
- Non-exempt employees must be paid minimum wage and time and a half for any hours over 40 in a work week.
- Under the South Carolina Payment of Wages Act an employer must give employee 7 days' written notice of reduction in pay.

Furloughs

- A mandatory temporary leave of absence.
- The employer expects to bring the employee back to work.
- Often used when a company needs to cut costs during a downturn in business.
- Can be unpaid leave for a block of days/months or a reduction in number of days worked over a certain period of time.
- Remain on the payroll; benefits may continue.
- Employee may be entitled to partial unemployment benefits.

Voluntary RIFs

- Includes an offer, such as an early retirement incentive, for the employee to voluntarily separate employment.
- Generally conditioned on the employee signing a release of all claims.
- The release must be supported by valid consideration (i.e., something of value that the employee is not already entitled to).
- Selection of those to receive request cannot be discriminatory.
- Collective Bargaining Agreement may not apply.

Early Retirement Incentive Packages

- Must be voluntary
- Offer retirement incentive to a certain group of employees
- Open for a reasonable period of time
- Does not result in arbitrary age discrimination



Older Workers Benefit Protection Act (OWBPA)

Older Workers Benefit Protection Act (OWBPA)

- OWBPA is an amendment to the Age Discrimination in Employment Act (ADEA) made in 1990.
- Makes it unlawful for employers to:
 - Target older workers when laying off workers or undertaking staff-reductions;
 - Fail to follow certain procedures when asking older workers to waive their rights under the Age Discrimination in Employment Act.
 - Use an employee's age as the basis for discriminating against them in regards to benefits

ERIs and the Older Workers Benefit Protection Act (OWBPA)

- It shall not be unlawful for an employer, employment agency or labor organization. . . to observe the terms of a bona fide employee benefit plan . . . that is a voluntary early retirement incentive plan consistent with the . . . purposes of [ADEA]. 29 U.S.C. § 623(f)(2)(B)(ii).

Involuntary RIF

1. Consider legitimate business needs – What is the reason for the RIF?

- Ex: overall financial issues
- Ex: lack of work/production in a particular department
- Ex: too many of a particular position across the company

2. What is the goal of the RIF?

- Reduce overhead by a certain amount
- Reduce workers in a department consistent with available work
- Reduce positions without sufficient work

3. What is the selection criteria used for individuals?

- Seniority (last in, first out)
- Performance
- Selection of individuals is important and cannot be discriminatory
- Selection based on reduction of department/business unit, eliminating positions, seniority

Consider Federal Discrimination Laws

- Title VII of the Civil Rights Act – race, sex, (gender identity, sexual orientation, pregnancy), color, national origin, religion
- Age Discrimination in Employment Act (ADEA) – 40 and older
- Americans with Disabilities Act (ADA) – mental and physical disabilities
- Uniformed Services Employment and Reemployment Rights Act (USERRA) - veteran status
- Genetic Information Nondiscrimination Act (GINA) – genetic information

Broad Scope – Retaliation and Protected Activity

- Federal laws also prohibit retaliation.
- Consider recent complaints and protected activity.
- Filing an EEOC Charge is protected activity under Title VII.
- The Fair Labor Standards Act (FLSA) prohibits discharging an employee because the employee had instituted any proceeding related to the FLSA (i.e., complained to the DOL).

Consider State Discrimination Laws

- For example, SC statutory law prohibits retaliation against an employee for instituting a workers' compensation proceeding.



Consider Employees on Protected Leave

- Employees on leave under the Family and Medical Leave Act (FMLA).
- Employees on leave because of a disability under the Americans with Disabilities Act (ADA).
- Employees on protected military leave under the Uniform Services Employment and Reemployment Rights Act (USERRA).

Layoffs and Collective Bargaining Agreements

- Be sure to review the terms of any collective bargaining agreements.
- CBAs typically include requirements related to layoffs or RIFs.
 - Govern selection criteria – ex: RIF must be based on seniority or seniority plus
 - Bumping rights – ex: CBA may allow you to “bump” a worker with less seniority to fill an open or remaining job.
 - Superseniority – protects union representatives or shop stewards.
 - Recall rights designated to certain employees.

Tips for Conducting a RIF

- Identify the need for the RIF well in advance
- Determine whether the WARN Act applies (including any mini (State) WARN Acts
- Consult with legal counsel
- Document the legitimate business reasons for the RIF
- Document the business unit, department and positions to be effected
- Document the selection criteria and selection process
- Use objective criteria whenever possible
- Review the current demographics of your workforce (to include all protected classes – age, race, gender, pregnancy, gender identify, sexual orientation, nationality, disability, religion, veteran status.
- Compare the demographics of your workforce as it will look once the RIF is completed.
- Consider disparate impact and adjust selection as needed

Severance Agreement

- A contract, or legal agreement, between an employer and an employee that specifies the terms of an employment termination, such as a layoff.
- Also referred to as a “separation” or “termination” agreement or “separation agreement general release and covenant not to sue.”

Requirements for Release of Age Claim (OWBPA)

- Good Resource: EEOC’s “Q&A – Understanding Waivers of Discrimination Claims in Employee Severance Agreements”

Severance Agreement

General Requirements for Waivers of Discrimination Claims

- Must be supported by consideration.
- Waiver must be “knowing and voluntary.”
- Cannot require employee to waive future rights.
- Cannot
 - waive an employee’s right to file a Charge with the EEOC;
 - limit an employee’s right to testify, assist participate in an investigation, hearing or proceeding conducted by the EEOC.

Consideration for Severance Agreement

- Something of value to which the employee is not already entitled.
- Cannot be accrued and unused vacation owed to the employee.
- Cannot be bonus owed to employee.
- Can be lump sum (certain number of weeks’ pay) not otherwise owed.
- May include the right to resign, depending on circumstances.
- May include agreement not to contest unemployment – but employer needs to be truthful in responding to information from state unemployment agency.

Definition of “Knowing and Voluntary” for Release of ADEA Claims

- Written in a manner that can be clearly understood – use plain language geared to the education and comprehension level of average individual/employee.
 - Must not be misleading.
- Must specifically refer to rights or claims arising under the ADEA by name.
- Must advise employee in writing to consult with an attorney before accepting the agreement.
- Provides the employee at least 21 days to consider the offer.
- Gives the employee 7 days to revoke his or her signature.
- Cannot include release of claims that arise after the date on which the waiver is executed.
- Supported by consideration.

Invalidity of Release of ADEA Claims

- Where agreement fails to meet the seven criteria of “knowing and voluntary.”
- Where induced by fraud, undue influence or other improper conduct to coerce the employee to sign it.

Group Layoffs Under OWBPA

- Group = two or more employees
- Exit incentive programs
 - Voluntary program
- Other employment termination programs
 - Involuntary termination
- Program exists if employer offers additional consideration (incentive) to leave in exchange for signing release to more than one employee

Additional Requirements for Group Layoffs

- Group = 2 or more employees
- Up to 45 days (instead of 21 to consider the waiver)
- Inform employees in writing:
 - The decisional unit = class, unit or group of employees from which the employer chose the employees who were/were not selected
 - Eligibility factors for the program
 - Applicable time limits
 - Job titles and ages of all employees who were eligible/selected
 - Ages of all individuals in the same job classification who were not selected

Example of Information Provided for a Group Layoff

| Job Title | Age | # Selected | # Not Selected |
|---------------------|-----|------------|----------------|
| Bookkeepers | 25 | 2 | 4 |
| | 28 | 1 | 7 |
| | 45 | 6 | 2 |
| Accountants | 63 | 1 | 0 |
| | 24 | 3 | 5 |
| Retail Sales Clerks | 29 | 1 | 7 |
| | 40 | 2 | 1 |
| Wholesale Clerks | 33 | 0 | 3 |
| | 51 | 2 | 1 |

Best Practices – Severance Agreements

- Include a cover letter reiterating that employee 40 or older has up to 21 days to accept the agreement.
- Be aware that material changes restart the 21-day period.
- For employees under 40 establish a reasonable deadline to return the agreement.
- Specifically reference federal employment laws.
- Make sure severance agreement is not signed before last day of employment – will not cover remaining time period during employment.
 - If continuing as employee, consider Severance Agreement with Release attached as Exhibit to be signed on last day of employment
- Make the deadline for paying severance pay after the 7-day revocation period for employee 40 or older (and pay employee after the revocation period).
- Make sure terms of Agreement reflect that it is “knowing and voluntary.”

PART 2 ///

Worker Adjustment and Retraining Notification (WARN) Act

Worker Adjustment and Retraining Notification (WARN) Act

- Background

- Enacted on August 4, 1988, and became effective on February 4, 1989.
- Born out of the closings of large steel mills in the 1970s and 1980s.



- General Provisions

- Requires covered employers to provide notice 60 days in advance of covered plant closing and covered mass layoffs.
- Notice must be provided to either affected workers or their representatives (e.g., labor union); to the state dislocated worker unit; and to the appropriate unit of local government.

Who's Covered Under the WARN Act?

- Employer Coverage

- Private, for-profit; private non-profit; and public and quasi-public entities operating in the commercial context.
- Employers with 100 or more employees, not counting employees who have worked less than 6 months in the last 12 months and not counting employees who work an average of less than 20 hours per week.

- Employee Coverage

- Hourly and salaried workers, including managerial and supervisory employees.



What Triggers Notice Under the WARN Act?

- Plant Closing

- Where an employment site will be shut down **and** the shutdown will result in an “employment loss” for 50 or more employees during any 30-day period.



- Mass Layoff

- Where there is an “employment loss” at a single employment site during any 30-day period for 500 or more employees; **or**
- Where there is an “employment loss” at a single employment site during any 30-day period for 50 to 499 employees if they make up at least 33 percent of the employer’s active workforce.

Mass Layoffs and Remote Workers

- Mass layoffs apply to a *single site of employment*.
- Although “single site of employment” is not defined by the Act, the regulations provide that a single site of employment is “either a single location or a group of contiguous locations.”
- The regulations further provide that for mobile workers, workers whose primary duties require travel from point to point, such as sales persons, the single site of employment will be their “home base, from which their work is assigned, or to which they report.”
- Case Study: *Piron et al. v. General Dynamic Information Technology, Inc.*, No. 3:19-cv-00709-REP (E.D. Va. Sept. 27, 2019)

Exemptions: The WARN Act is **NOT** Triggered When...

- A plant closing affects only a temporary facility;
- A plant closing or mass layoff constitutes a strike or lockout not meant to evade the WARN Act; or
- A plant closing or mass layoff occurs because particular facility, project, or undertaking is completed and affected employees were hired understanding that their employment was limited to that facility, project, or undertaking.



What's an "Employment Loss" Under the Act?

Three Scenarios:

1. Termination, other than a discharge for cause, voluntary departure, or retirement;
2. Layoff exceeding 6 months; or
3. Reduction in an employee's hours of work of more than 50 percent in each month of any 6-month period.



Business Relocation Transfer Exception:

1. Refusal to transfer to a different site within reasonable commuting distance is not an employment loss.
2. Acceptance of a transfer outside this distance within 30 days after it is offered **or** within 30 days after the plant closing or mass layoff, whichever is later, is not an employment loss.

The Problem

A covered employer expecting a 2-3 month long temporary layoff at a single site lays off 500 full-time employees. Is the WARN Act triggered?

No – The scenario does not qualify as an “employment loss.” First, the layoff is temporary and the employees expect to be recalled, so it is not considered permanent termination. Second, the layoff is not expected to exceed 6 months, and there is no reduction in hours of work to exceed 6 months.

The Solution

90-Day Aggregation Rule for Plant Closings and Mass Layoffs

- Employers must look ahead 90 days and look back 90 days from each employment loss to take into account both planned and completed employment losses.
 - Separate employment losses occurring within any 90-day period triggers the WARN Act requirements if the losses when added together involve the requisite number of employees.
 - If the aggregated employment losses trigger the WARN Act, notice requirements apply as of the date of the first individual termination.
- Prevents employers from using repeated small layoffs to escape the notice requirements.
- Notice is not required under the WARN Act if the employer demonstrates that the employment losses are the result of separate and distinct actions **and** are not an attempt to evade the WARN Act's requirements.

What is the Requisite Notification Period?

- Notice must be timed to reach the required parties at least 60 days before a closing or layoff.
 - When the individual separations for a closing or layoff occur on more than one day, the notices are due to the employees' representatives, state dislocated worker unit, and local government at least 60 days before each separation.
 - If the workers are not represented, each worker's notice is due at least 60 days before that worker's separation.



What are the Exceptions to the 60-Day Notice?

1. Faltering Company

- Narrowly construed exception
- Where a company has sought new capital or business to stay open and giving notice would ruin the opportunity
- Applies only to plant closings

2. Unforeseeable Business Circumstances

- Where business circumstances are not reasonably foreseeable at the time notice was required
- Applies to plant closings and mass layoffs

3. Natural Disaster

- Where the plant closing or mass layoff is the direct result of a natural disaster, such as a flood, earthquake, drought, or storm

The Problem

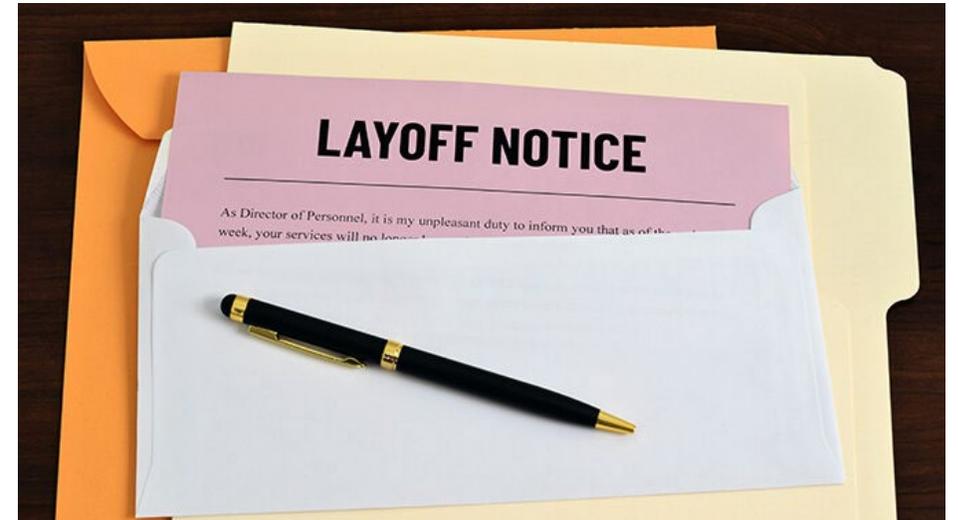
The same covered employer expecting a 2-3 month long temporary layoff at a single site lays off 500 full-time employees. At 3 months in, *unforeseen* business circumstances arise and the employer is required to extend the layoff beyond 6 months. When was the WARN Act triggered?

At 3 months – Under the “unforeseen business circumstances” exception, the WARN Act was triggered at the time it becomes reasonably foreseeable that the extension is required and notice must be given at this time.

The Solution

What Language Must the Notice Include?

- Form
 - Written Notice
 - Reasonable method of delivery to ensure timely receipt
- Contents
 - Specific and plain language:
 - Temporary or permanent nature of layoff or plant closing
 - Entire or part closing of plant
 - Commencement date
 - Expected employment loss date
 - Bumping rights
 - Employer contact



What are the Penalties for Violating the Act?

- Employees:
 - Back pay and benefits for the period of violation, up to 60 days.
 - Liability may be reduced by wages paid during the violation period, and voluntary and unconditional payments made to the employee.
- Unit of Local Government:
 - Civil penalty up to \$500 per day.
 - Penalty may be avoided if the employer satisfies the liability to each aggrieved employee within 3 weeks after the plant closing or mass layoff is ordered.

Violations Subject Employers to Individual and Class Action Suits



Houston, We Have a Problem

- Allegations of failure to provide approximately 675 workers with advance written notice.
- The April 4, 2023 lawsuit calls the layoffs foreseeable and alleges Virgin Orbit owes proposed class members wages, bonuses, health and life insurance premiums, accrued holiday pay, accrued paid time off for 60 days post-termination, and health insurance benefits.



Losing More Than Weight

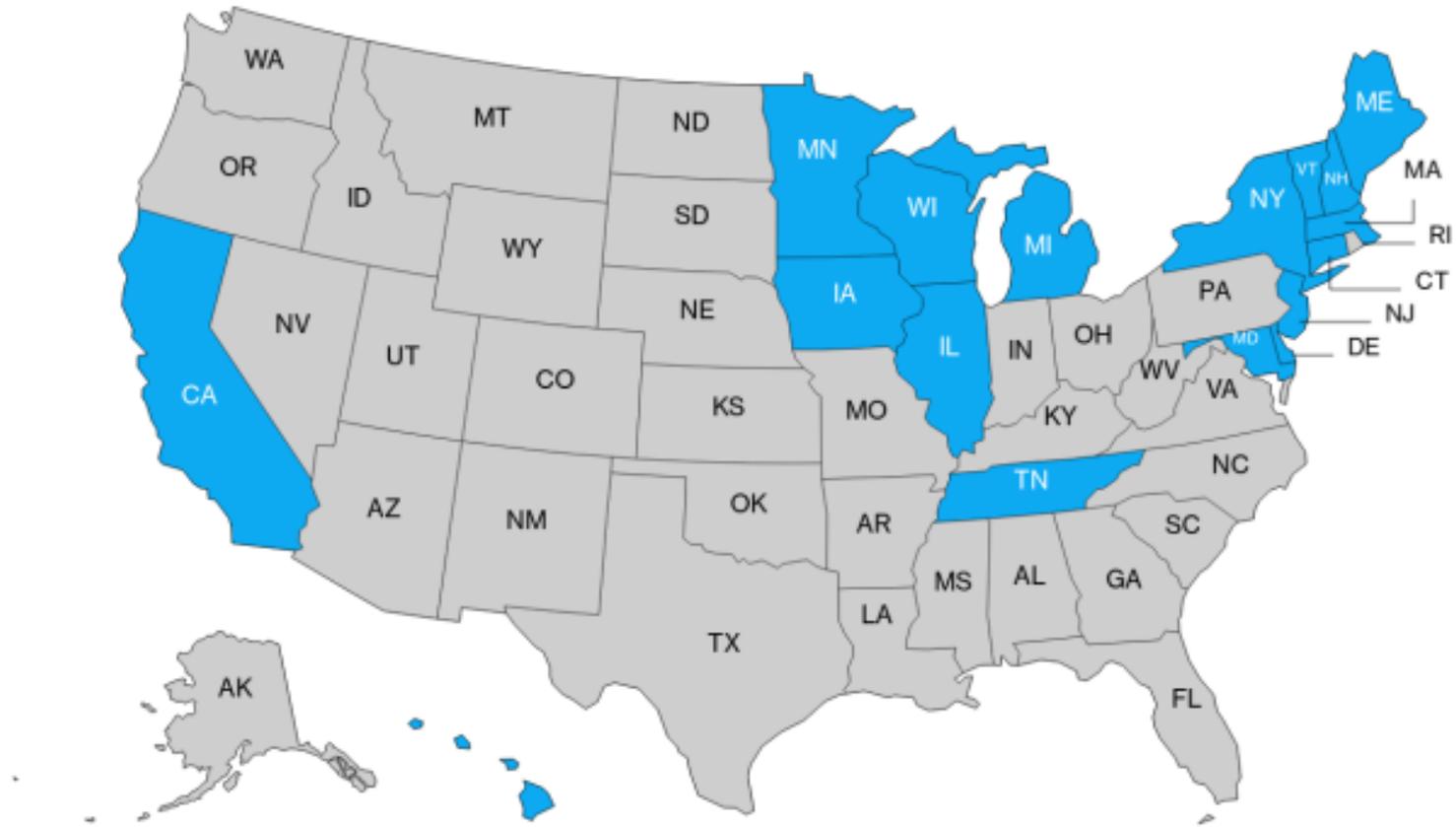
- Allegations of failure to provide over 1,000 workers with advance written notice.
- Employees part of the May 4, 2023 action are seeking pay for the full 60 days since the original notice was sent, as well as the monetary value of the benefits they would have enjoyed during that time.

PART 3 ///

The Rise of Mini- WARN Acts

States With Laws on Mass Layoffs, Plant Closings

■ State Law ■ No State Law



Source: Bloomberg Law as of Dec. 8, 2022

Bloomberg Law

State Mini-WARN Acts: State Laws Creating WARN-Like Obligations

- California
 - Applicable to a “covered establishment” that employs or has employed 75 or more full and part-time employees in the preceding 12 months.
 - 60-day notice period .
 - Plant closure affecting any amount of employees.
 - Layoff of 50 or more employees within a 30-day period regardless of percent of workforce.
 - Other relocation provisions.

State Mini-WARN Acts: State Laws Creating WARN-Like Obligations

- New York
 - Covers private employers with as few as 50 employees.
 - 90-day notice period.
 - Plant closing occurs when an employment loss affects 25 or more full-time employees during a 30-day period due to permanent or temporary shutdown.
 - Mass layoff occurs when, over a 30-day period, a reduction-in-force results in an employment loss lasting more than six months for: (a) at least 25 full-time employees who represent at least 33 percent of all employees at the site; or (b) at least 250 full-time employees.
 - Other relocation and reduction in hours provisions.

State Mini-WARN Acts: State Laws Creating WARN-Like Obligations

- New Jersey (Effective April 10, 2023)
 - Covers private employers with 100 or more part-time and/or full-time employees.
 - Single place of employment is calculated at the “establishment level.”
 - In other words, terminations at different locations throughout the state may need to be aggregated (e.g., terminations of 10 employees at each of five separate locations)
 - 90-day notice period.
 - Mass layoff includes reductions-in-force affecting at least 50 employees in the state within a 30-day or 90-day period, regardless of what percentage of the overall workforce this number constitutes.
 - Mandatory severance payments regardless of compliance.

Thank
You

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