Key Considerations for a Reduction in Force

A reduction in force (RIF) is one of the most closely scrutinized employment events that create legal risk. Each RIF must be the product of unique planning, justification, and selection design, to achieve the particular business purpose. The following considerations are central to any RIF decision.

- **What Is The Business Objective?** Determine what business need your RIF is intended to satisfy.
    - **What Is The Business Climate That Brought You To This Business Objective?** Make sure that the business climate is at the forefront of any communication piece about a RIF.
        - **Merger/Acquisition**. If your business objective is the result of a merger or acquisition, consider the internal politics of the integration, the economic situation that the target company was in prior to the transaction, whether a RIF is something that its employees expected.
        - **Macro-Economic Downturn**. If your business objective is the result of a macro-economic downturn, consider whether the macro-effect has been realized at the local level of the company. Employees tend to become more fearful during macro-economic downturns, but a RIF still might be unexpected if the macro changes have not been felt locally.

        - **Micro-Economic Downturn**. Is the business objective a result of a failing division, location, or department. If so, it is likely that a RIF will not come as a surprise to affected employees.

        - **Strategic Re-organization**. Is the business objective part of a proactive approach at re-positioning the company?

    - **Related To The Business Objective, Where Are You Today And Where Do You Need To Be After The RIF?**

    - **Are There Circumstances Of The Business Climate That Could Drastically Change, Requiring Any Major Deviation In Your Business Objective In The Near Term?** If so, have a back up plan and a solution pre-packaged in the event a drastic change requires a rapid shift in your objective.

- **Are We Under Any Time Constraints?** What are they and are these self-imposed or third-party imposed? Who set the time constraints and for what reason?

    - **Notice to Employees.** How soon can/should we notify employees of the company's RIF plan? How much notice do we want to give and how much notice can we give? Be cautious not to fall into fraudulent suppression or fraudulent misrepresentation traps. Do not appear to make long term commitments to new hires or give any false reassurance of job stability that could induce someone to take any greater risk on job security with your company.

- **WARN Act – 60 Day Notice Requirement**. The Worker Adjustment Retraining and Notification Act will require that you provide employees (and certain governmental units) with a minimum of 60 days' advance notice prior to a facility closing (resulting in the loss of employment of 50 or more employees at any one facility during any 30 day period) or a mass layoff (resulting in a loss of 33% or more of any one facility's employees over a 30 day period, provided that at least 50 employees are lost).

- **OWBPA – 45 Day Consideration Requirement and Disclosures.** If a release and waiver agreement containing a release of any federal age discrimination claims will be requested of any RIFed employee, then the Older Workers' Benefit Protection Act requires that RIFed employees age 40 and over must be provided 45 days to consider whether or not to accept the terms of the RIF. Since we typically do not want employees to sign a release and waiver agreement until their last day worked, the consideration period should be factored in the time line.

  - **OWBPA Disclosures.** There are two sets of key disclosures that must be made to employees age 40 and over included in a RIF. One set of disclosures includes key terms that must be incorporated in your severance agreement. The other set of disclosures includes specific information about the eligible and ineligible employees.

- **Eligibility Disclosure.** The OWBPA requires that you provide employees age 40 and over with the specific eligibility factors for the RIF, a list of job titles and ages of employees eligible for the RIF and a list of job titles and ages of employees in the same decisional unit who are not eligible. Employees age 40 and over should be provided with 45 days to consider this information along with the terms of the release and waiver.

- **Explicit Disclosures in The Release And Waiver.** The release and waiver document provided to employees age 40 or over must be in writing, use understandable language, specifically reference the waiver of ADEA rights, not waive future claims arising after the signature on the agreement, result in the exchange of valuable consideration, advise the employee to consult an attorney, and advise the employee of the 45 day consideration period and the 7 day revocation period.

- **Revocation Period.** If the 40 or over employee signs the release and waiver agreement at any time within the 45 day consideration period, the employee then has a 7 day period in which he/she may revoke that signature. For this reason, your release and waiver agreement should specify a distinct method of communicating a revocation and provide for payment only after you are certain the revocation period has expired.

- **Are You Under Any Contractual Constraints?** If you have employment contracts, temporary labor contracts, government contracts or union collective bargaining agreements, those contracts should be reviewed early in the RIF program design phase to ensure that the program you design does not result in an inadvertent breach.
    - **Collective Bargaining Agreements.** Many collective bargaining agreements embrace a seniority system that could mandate the RIF criteria applicable to unit employees. These terms might also provide in advance the benefits and payments required in the event of a RIF. Additionally, union contracts may have unique notification steps that must be followed before a RIF decision can be rolled out.
- **Will The RIF Be Temporary, Conditional or Permanent?** Traditionally, a "layoff" is a temporary or conditional RIF that implies an intent by the company to recall workers when seasons or business cycles change, work picks up or business conditions improve. Do not use the word "layoff" if you do not intend to recall workers.
    - **Temporary or Conditional Layoff.** In the event you intend a temporary or conditional layoff, prepare clear criteria, goals and timetables for your recall in advance. Devise a procedure by which employees will be recalled. Will

employees be recalled by division, location or department? Will they be recalled by seniority or range of skill? Will some other factor be considered?

- **Permanent RIF.** A RIF is a permanent reduction of employees without any expectation of recall. It does not mean that the company has given up hope that circumstances will change. It simply means that the company does not know when circumstances will change, does not anticipate it occurring in the near term and does not wish to give employees a false hope that their services will be needed soon.

- **What Factors are Relevant to A Determination of Whom Should Be RIFed?** The goal should be to have objective (not subjective), facially neutral, and risk reducing criteria for whom is selected. Additionally, the hardship of a RIF should be shared by any responsible employee or manager. In the midst of a RIF, executives should not be reported receiving lavish bonuses or taking luxurious trips. Where appropriate given the business climate and objectives, the RIF should affect management and employees proportionately.

  - **Voluntary RIF.** As a first step, you could avoid a selection process by requesting RIF volunteers after communicating the business climate and business objective that could require a mandatory RIF. A voluntary RIF tends to appeal to three groups of employees: (1) those who are near retirement; (2) those who are poor performers already at risk of losing their job; and (3) those who are strong performers already in high demand in the labor market. As part of the voluntary process, you should make it clear that the company reserves the right to deny an employee's voluntary RIF request. This gives you the opportunity to keep employees you cannot afford to lose.

- **Underperforming Units.** If a division, location, or department is underperforming and the entire division, location, or department can be scheduled for a RIF, you have a solid, objectively neutral basis for eliminating the entire division, location, or department. It is a most difficult burden for a RIFed employee to dispute that he/she should have been retained or was wrongfully RIFed when his/her entire unit was eliminated.

- **Pick & Choose.** If your business objective requires that you pick and choose across some or all units, your burden becomes a bit tougher. Picking and choosing inherently requires discrimination (preferably of the lawful sort). You should select consistent, objective criteria for selecting the employees who are to be included in the RIF. If you do not have access to readily available objective data, consider implementing an objective system for evaluating employees.

    - **The Best Objective Factors Include:**

        - Length of time with company
        - Length of time in particular position
        - Individual performance as measured by quantifiable, objective data

- **Less Objective But Still Useful Factors Include:**
  - Certifications, Licenses, Advanced Training
  - Prior job experience
  - Length of time in field/industry
  - Range of demonstrable skills (cross-training)
  - Supervisor's performance appraisals
- **Ad hoc Selection Methods.** Many employers will find that they are short on objective data or that the objective data they have is inconsistent among comparator groups. These employers may implement a unique selection process driven solely by the need to conduct a RIF.
  - **For Example:** The company may communicate with supervisors that a need for RIF has arisen. As part of the evaluation process, the company asks each supervisor to rate their subordinates on a scale of 1 to 5 in a handful of key performance areas. Those supervisory ratings are delivered to a central HR representative who applies a ratings curve to each supervisory batch, breaking employees out into the top third, middle third, and bottom third, trusting that no matter how a supervisor's rating scale might vary, the lesser performing employees will follow in the bottom third. HR then selects RIF candidates from the bottom third, beginning

with the least tenured (or using some other comparable objective basis). It is not unusual to see some facet of a self-appraisal factored into the supervisory appraisal.

- **What Benefits Will Be Provided To RIFed Employees?** If you intend to pay any employee a severance, you should absolutely request a release and waiver as a condition of payment. You may wish to offer some benefits that are not conditioned on the employee signing a release.
    - **Will You Offer Any Unconditional Benefits?** Do you wish to offer outplacement assistance? If you have a contract with an EAP provider, the EAP contract may already provide these benefits. Gather details now. If your EAP contract does not include outplacement assistance, but you do have an EAP contract, it may be possible to add outplacement service at a nominal cost. Additionally, what is the company's policy on job references? Most employers provide a neutral reference (including dates of employment and last position held, provided that references are directed to a central contact.) Will any other form of reference be provided? Are there any other, unconditional benefits (not including mandated COBRA obligations) that you will provide?
    - **Get A Legal Partner To Work With You On Drafting Your Severance Plan Or Policy, Release And Waiver Agreements, OWBPA Compliance Language, And WARN Notices.** Drafting and refining a separation agreement is not a simple task and work should begin on these documents at the first sign of a possible RIF.

- **Severance Plans May Be Considered An ERISA Plan.** They should be in writing and should spell out key terms of eligibility, selection criteria, benefits and payments to be made, requirements in exchange for benefits, and any disqualifying or unique factors. You may have a standing severance plan or you may create one solely for a particular business objective. If created for a particular business objective, be sure to close the policy down when that objective is complete.

- **Consider Benefits Such As The Following Based On Pay Grade And Years Of Service To The Company:**

  - Lump sum cash or salary continuation
  - COBRA insurance premiums (either company paid or grossed up for lump sum)
  - Outplacement assistance
  - Vocational retraining assistance
  - EAP counseling
  - If employees have stock options or restricted stock grants, either vest them automatically or consider them forfeited (automatic vesting is the most common practice)
  - Employee job references (whether to provide them at all and if so how and what reference information will be provided)

- **Determine In Advance How A RIF Will Affect Other Company Benefits.**
    - Bonuses partially earned
    - Commissions in the pipeline
    - Unfinished training or company-paid education
    - Relocation or sign-on bonus obligations
- **Note That In Most Jurisdictions Receipt Of Severance Will Disqualify A Former Employee From Or At Least Result In An Offset Of Unemployment Benefits.** Expect your company's unemployment insurance experience rating (SUTA tax) to increase significantly as a result of any RIF.

- **Who Will Be the Company's Decision Makers?** Nearly every RIF, no matter its size, brings a fair share of risk that a legal claim will arise. Centralize decision-making authority over the RIF in a small group of high level people who are capable of explaining their RIF decision if called upon to testify.
    - **Organize A Central Process For Overseeing Key Facets of the RIF.** Digesting the selection factors, preparing and sending out severance paperwork, overseeing receipt of accurate paperwork, ensuring proper payment, and sending out notices will take strong, centralized control.
    - **Who Will Have Authority To Deal With Unique Situations Arising As Part Of The RIF?** Unusual and unexpected employment claims and requests for modification or exception to the terms of the RIF policy and release and waiver agreements is

to be expected during any RIF. Centralize the authority over these unique decisions. Communicate early in the process that generally no exceptions will be made, but that if there is a unique request for an exception it should be directed to a unique decision maker or group of decision makers.

- **Keep Good Records Of All Data And Factors Considered, Each Decision Process, And All Paperwork Used To Plan For, Carry Out, And Complete The RIF.**

- **Plan A Timetable For Rolling Out Communication To Management and Employees and Prepare It in Advance to Anticipate Questions.**
    - Verbal communications about the RIF should also be written
    - Written communications about the RIF should also be verbal
    - Consider using an FAQ document and have a centralized Q&A hotline to be answered by a small group of HR people who understand company benefits and the RIF process and can help associates with their questions.

- **Have A Definite Timetable for Completing the RIF.** When it is finished, be sure to communicate this point without giving employees any false confidences. Preserve documents and evidence surrounding the RIF until you are out from under legal scrutiny.