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Managing the Legal Risks of Layoffs: Design and Delivery

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The Cost of RIF-Related Litigation

\$5.5 Million jury award to one employee claiming sex discrimination in a layoff of 100 employees.

\$1.2 Million jury award to one former executive alleging age discrimination in a layoff.

\$4.1 Million settlement to 11 former employees alleging age discrimination.

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Is a layoff necessary or appropriate?

- A layoff may not save an employer money in the long run
 - Severance costs
 - Legal fees from employment claims
 - Attrition of valued employees
 - Increase in unemployment tax
 - Downstream costs of hiring “newbies” when the economy improves

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Alternative to Layoffs

- Employer prerogative?
 - Legal v. Practical (Evidentiary)
- Last resort
 - Hiring freezes
 - Wage freezes
 - Reduction/elimination of bonus programs
 - Reducing work hours
 - Reducing benefits/increasing deductibles
 - Reassignments

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Document “Economic Necessity”

- Prepare a report or document outlining
 - Economic conditions necessitating RIF
 - Alternatives evaluated



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Make a Plan

- Evaluate/define decisional units
- Design selection process
- Collect and analyze data for decisional units
- Identify employees
- Assess impact
- Finalize list
- Prepare for delivery

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“Operational” Layoffs

- Decisional units by product, location, department
- Evaluate which positions are essential or non-essential for effective operations
 - Duties can be absorbed by other employees
- Focus first on *business*: minimum personnel necessary to produce quality product or ensure excellent customer service

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Sloughing Away the “Dead Wood”

- Most RIF’s are *not* purely economic
 - Rather, economic conditions often force employers to evaluate, rank, focus on performance management of “under-performing” employees
- The “more with less” rationale: *But for* economic conditions, we would not have scrutinized employee performance
- Failure to document, manage performance

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Develop an “Ad Hoc” Committee

- Depending on size of company and scope of layoff, form and convene a DIVERSE “ad hoc” committee to
 - Establish selection criteria
 - Evaluate candidates against selection criteria
- Furnish training to “ad hoc” committee on EEO principles, application of selection criteria

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Develop “UNIFORM” Selection Criteria

- *Objective* (data-based) indicia of performance
 - Basic
 - Seniority, sales figures, numeric performance evaluations, # of disciplinary write-ups, bonuses
 - Creative
 - Skills listed on application, codes entered by mechanics upon completion of repair, production goals
- The *employer* gets to establish selection criteria
- DOCUMENT the selection criteria and its rationale

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Is there room for “subjective” criteria in the analytic process?

- Yes, but be careful: subjective selection criteria are often attacked as concealing discriminatory animus
- Blend objective and subjective factors
- Subjective factors (e.g., good attitude, team player)
 - Can usually be translated into some objective measurement
 - Must be justified, defined, outlined and DOCUMENTED

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The Disparate Treatment/Disparate Impact Continuum

- Disparate treatment: well-designed RIF (e.g., objective factors, neutral selection committee) is essential to overcoming “disparate treatment” claims
- Disparate impact: objective, neutral RIF criterion can still have an “adverse impact” on protected employees

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Assessing Adverse Impact

- Preliminary selections should be analyzed to determine whether any protected group is overrepresented
 - Define employees in the pool or decisional unit
 - Business unit, supervisor, department, product, geography
 - Ensure accuracy of employee databases
 - Race, age, gender, ethnicity
 - Do a preliminary “smell” test
 - Average age of those laid off, average age of those retained

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Adverse Impact: RIF Free Adverse Impact Tool @ www.bcginstitute.org

	Men		Women		
	#	%	#	%	
Pass	Retained	90	90.0	48	80.0
Fail	Not Retained	10	10.0	12	20.0
80% Test (1)				0.89	
Stat. Test-EXACT (2)				0.077	
Stat. Test-Estimated(2)				0.075	
Interpretation of EXACT Statistical Test (3)					
Likelihood (One Chance In):		13			
Probability as Std. Deviations:		1.767			
Interpretation of ESTIMATED Statistical Test (3)					
Likelihood (One Chance In):		13			
Probability as Std. Deviations:		1.778			

Calculate Load Sample Data Clear Form

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Code Red

- Big numbers are bad numbers
 - If the RIF involves the loss of more than 50 employees, consult with employment counsel
 - Retain labor economist/statistician to conduct chi-square, Fisher exact, z-tests on selection data
 - Be mindful of the EEOC’s focus on systemic cases

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If there's adverse impact . . .

- Option 1: Rework the selection process or criteria to minimize impact
- Option 2: Consider whether other criteria meets employer goals but has less impact
- Option 3: Prepare to defend criterion as “job related and consistent with a business necessity”

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WARN Act Considerations

Requires 60 days' advance notice to employees (and others) of covered “plant closing” or “mass layoff”

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WARN Available Remedies

- Back pay and benefits for 60 days
- Civil penalty of \$500 per day
- Attorneys' fees
- Reduction for “good faith”
- Offsets to damage awards
- Pay-in-lieu of notice

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Events Triggering WARN Notice

- Plant closings
- Mass layoffs

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WARN “Plant Closing”

- Temporary or permanent shutdown
- Single site of employment or operating unit
- Employment loss of 50 or more employees (excluding part time employees)
- During any 30 day period

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WARN “Mass Layoff”

- Single site of employment
- During any 30 day period
- Which involves:
 - 33% of active employees (excluding “part-time” employees)
 - AND
 - at least 50 full time employees
 - OR
 - At least 500 employees

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**Who Receives WARN Notice?
(Not Just Employees)**

- Affected employees
- The “state dislocated worker unit”
- Chief elected official of local governmental unit
- Bargaining representative of unionized employees

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What Must the WARN Notice Include?

Depending on who is getting the notice, the regulations have different requirements that must be met.

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WARN Issues

- Exemptions to WARN requirements -
 - 1 Temporary Project/Facility
 - 2 Strike or Lockout

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WARN Issues

"Employment Loss"

WARN does not apply to layoffs of 6 months or less - But, be careful about short term layoffs that become WARN events

Transfers sometimes are not "employment losses"

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WARN Issues

Unforeseeable Circumstances Exception

May close or lay off before the end of 60 days

- "Sudden, dramatic, and unexpected" business circumstances not reasonably foreseeable at the time the notice would have been required and
- Give as much notice as practicable, including a brief statement of the reason for reducing the notice period

Narrow exception – often litigated

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WARN Issues

Faltering Company Exception

May close or lay off before the end of 60 days

- At the time notice would have been required, employer was actively seeking capital or business which
- If obtained, would have avoided or postponed shutdown *and*
- Employer reasonably believed that giving notice would have hurt chances of getting capital or business

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WARN Issues

Faltering Company Exception

- ← Only applies to plant closings
- ← Only applies on a company-wide basis
- ← Connection between capital and RIF required
- ← Must still give as much notice as practicable
- ← Narrowly construed – often litigated

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WARN Issues

Natural Disaster

If closing or layoff is due to natural disaster such as flood, earthquake, drought, notice obligation is limited – the employer must give as much notice as possible and explain why less than full notice is given

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WARN Issues

Sale of Business - *When an employer sells all or part of its business*

Seller - responsible for providing notice for all plant closings or mass layoffs up to and including effective date of sale

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WARN Issues

Sale of Business - When an employer sells all or part of its business

Buyer - after the sale, buyer is responsible for providing notice

Caveat: any person who is an employee of the seller as of the date of sale shall be considered an employee of the purchaser immediately after the date of sale

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WARN Issues

What if you can't give some or all of the required notice?

Pay-in-lieu of notice

← Pay issues

← Benefit issues

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WARN Issues

Some states have "mini-WARN" statutes or other laws that could impact your RIF

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Delivery: Empathy Pays



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A PRIMARY GOAL: Maintain Morale Of Retained Employees

- Treatment of adversely affected employees will be monitored by retained employees
- Communicate with retained employees and reassure them of their job security as much as possible
- Refocus on good employee relations

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EMPLOYEE RELATIONS – The Best Defense Is A Good Offense

- Frequent and honest communication is key
- Don't promise what you can't deliver
- If you don't know, admit it (and follow up)
- Top-Down approach: make leaders and managers champions of the message

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DEALING WITH RUMORS

- Consider developing a FAQ list
- Involve management in development and obtain “buy in”
- If questions arise that were not anticipated, don't wing it
- Follow up with answer and add to FAQ

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SURVIVOR SYNDROME

- Those left behind – both relief and guilt
- If you are able, reassure them of job security (but don't promise what you can't deliver)
- Acknowledge additional workload and appreciation of increased stress level
- Listen and communicate!

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Minimize Acrimony

- Consider face-to-face meetings
 - Listen/empathize much, say little
- Emphasize critical points
 - Last resort
 - Valued service
- Offer to serve as a reference
- Raise prospect of reemployment
- Severance
 - Non-monetary terms could be VALUABLE

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Thank You

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