RIF MANAGEMENT GUIDE

INTRODUCTION - Companies often find it necessary to conduct personnel reductions to stay competitive or remain in business. When these personnel reductions occur on a group basis, rather than on an employee by employee basis, it is known as a reduction in force ("RIF"). Any company that is considering the implementation of a RIF should ensure that the planned RIF is in compliance with US federal, state, and local legal requirements, as there are many laws governing the structure and implementation of this method of personnel reduction. This guide and the following sample documents serves as a blueprint for companies that are seeking to avoid and limit potential liability associated with structuring and implementing a RIF.

PRELIMINARY CONSIDERATIONS - Before deciding to implement a RIF, the company should be able to respond effectively to the following questions in order to minimize legal risks associated with RIF's under US labor and employment laws:

(1) why is the RIF necessary and what documented justifications does the company have for the RIF;
(2) how will employees be selected for the RIF; and
(3) how will the company treat employees subject to the RIF?

In the event that employees affected by the RIF initiate litigation, the company will be required to address these issues to defend its personnel decisions. To assist the company's senior management in planning and preparing for the RIF, this guide can be used as a reduction in force checklist to be used by decision makers in structuring and implementing the RIF. To minimize risks under US labor and employment laws, a company should follow certain steps in assessing the need for a RIF, determining the scope of the RIF, selecting employees to be included in the RIF, and implementing the RIF. These factors are addressed below.

WHETHER A RIF IS NECESSARY - The first step in the RIF process is to determine whether a RIF is necessary. This usually involves a complete assessment of the company's management structure, departmental structure, and organizational structure. The company also should review its job descriptions and organizational charts during this process.

Once the company has assessed its operations, it should consider the purpose of the proposed RIF. For example, the RIF may be necessary to reduce costs, improve efficiency, move operations to automation, close a particular location, or any other legitimate, nondiscriminatory business reason. Whatever the reason, however, the company should ensure that it is documented and that it provides a legitimate basis for implementing a RIF. The company should also document how the RIF is best suited to address the issues facing the company.

In doing so, the company should document why other, less drastic measures such as hiring or promotion freezes, reduction of employee hours, or transfer of employees to other locations are infeasible or insufficient to avoid implementation of the RIF.

DETERMINING THE SCOPE OF THE RIF - The next step in the process is to identify the number of positions to be cut in each work unit, along with the criteria to be used in implementing the RIF. During this process, the company must ensure that its documented business justifications remain valid with respect to the contemplated RIF and the number of employees affected.

SELECTION OF EMPLOYEES FOR THE RIF - Once a company has decided on the scope of the RIF and documented its justification, the company then must decide upon the decision makers who will implement the RIF and how employees will be selected for the RIF. Because implementation of a RIF is a serious matter, the decision makers should be members of senior management. Confining decision making regarding the RIF to the senior management level will help to ensure that the RIF is implemented in a consistent manner and demonstrate that the company is taking seriously its obligations in the employee-selection process. However, lower level managers who have direct contact with the employees being considered for the RIF also may have input into the decisions.

In deciding which employees will be selected for the RIF, the company should determine whether it will implement the RIF on the basis of "objective" criteria such as seniority or elimination of certain job classes or subjective criteria such as performance. Use of seniority in selecting employees for the RIF provides the advantage of being recognized as a "safe harbor" by many federal employment discrimination statutes. See 42 U.S.C. § 2000e-2(h). However, many employers reject the use of seniority in making RIF decisions because this method fails to account for employee performance and contributions to the company. In other words, RIF decisions based on seniority reward longevity rather than performance. An alternative "objective" criterion is the elimination of certain job classes; however, this type of RIF works only in the relatively rare situations where elimination of an entire class of jobs is appropriate. Other objective methods include eliminating entire work locations and eliminating departments, but these criteria are similarly limited. They are options only if the company is closing a location or an entire department.

The other option is use of a subjective selection method. Before a company implements a RIF by selecting employees based upon performance or any other subjective criteria, it should confirm that it has adequate personnel records to support its decision making criteria. Past written performance evaluations should be only one part of the criteria used,

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as these evaluations provide only part of the picture about the employee and may be stale or incomplete. The evaluation of employees in connection with the RIF should be current, in writing, and as objective as possible. One possibility is to consider a formal or informal ranking of the employees relative to one another in the same job category so that those with higher rankings are retained and those with lower rankings are terminated. In the event that two employees who have a similar ranking are being considered for termination under the RIF, the company could use seniority as the "tie breaker " for the decision.

To reduce the level of risk associated with utilizing subjective selection criteria, there are a number of precautions the company can take. The following is a brief summary of these points relative to the selection process:

(1) **Select Decision Makers:** Selections should be made by more than one person. In particular, senior management and/or human resources personnel should make selections with the input of individuals who have personal knowledge of an employee's performance at the company. Typically, department supervisors or managers are best able to assess past performance and predict future performance and should be included in the selection decision making process. To the extent possible, a committee composed of individuals of different races, sexes, and ages should make selections to minimize the risks of employment discrimination charges. To ensure that the process is conducted appropriately, the company should consider asking management personnel involved in this process to sign a confidentiality agreement before the RIF is announced.

(2) **Evaluate Employees:** It is essential to build solid and well-documented cases for individual decisions. It is generally not a good idea to rely solely on past performance evaluations because these evaluations are often written in highly complimentary terms and are not designed for comparing employees with respect to the skills, knowledge, or abilities required for a RIF. Instead, it is more appropriate to prepare special ratings to assess past and present effectiveness on the job; the ability to adapt to the changing work environment; unique skills; supervisory competence; and ability to adapt to restructured job assignments. When possible, multiple evaluators who have personal knowledge of the employee's performance should provide input. All ratings should be reviewed for thoroughness, apparent consistency within the organization, and consistency with past evaluations.

(3) **Analyze And Adjust Selections:** Once the preliminary selection process is completed, it is recommended that management review the proposed list of employees selected for layoff, relocation, or varying levels of benefits and conduct a disparate impact analysis regarding potential claims of discrimination. This process will allow the company the opportunity to make any appropriate adjustments to the selections to avoid liability for disparate impact discrimination (i.e., a disproportionate number of minority group members were affected by the RIF).

An instructional memorandum for decision makers on selecting employees for a RIF based upon performance criteria follows, and should be used to ensure that the RIF is implemented in a consistent manner when performance criteria are used. If the company cannot provide the written records outlined, or otherwise document the analysis described, the company should implement the RIF using objective criteria.

ENSURING THAT THE RIF DOES NOT HAVE AN ADVERSE IMPACT OR DISCRIMINATE AGAINST EMPLOYEES IN A PROTECTED CATEGORY - Once the decision makers have made their initial rankings of employees, they should consider the effects of the proposed RIF on members of protected category groups (i.e., categories such as race, color, sex, national origin, age, religion, disability, union status, etc.) with the assistance of the Human Resources department and legal counsel. If necessary, the decision makers should consider making appropriate adjustments to the RIF procedures in order to avoid creating any inference of discrimination against members of protected groups. The company should also consider establishing a review committee to assess the preliminary RIF decisions to avoid any claims of bias.

IMPLEMENTING THE RIF - Once a company has selected employees for the RIF, the company must take steps to implement the RIF. In doing so, the company should consider offering employees redeployment at other locations or transfer to a different job class as a way to limit potential liability wherever possible. Steps taken to ameliorate the economic dislocations caused by the RIF are important considerations in not only the legal context, but also for purposes of public relations, consumer loyalty, and shareholders.

Designated corporate representatives who have frequent contact with the employees should be responsible for advising the employees to be terminated. These representatives should let the employees know the reasons for the RIF and provide the employees with information about available benefits and outplacement opportunities. It is critical that all representatives provide employees with consistent explanations for the RIF, as well as identical information about benefits packages, if any are being provided. Sample notification letters, Q&A sheets for representatives and corporate HR managers, and a communication protocol for corporate representatives to use when conveying the RIF decision are attached to this guide as illustrative samples. Alternatively, the company could also make the RIF announcement in the form of videotaped presentations shown to both terminated and surviving employees in small departmental settings with line managers and HR representatives available to answer questions.

In addition, the company may wish to consider offering additional benefits or severance packages to dislocated workers in exchange for a release of all potential claims against the company. While there are strict requirements that

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must be followed to obtain releases of potential claims in the RIF context, this may be a good method of limiting potential liability against the company.

Once the RIF has been instituted, the company should institute a post-RIF hiring freeze with respect to the positions and locations affected by the RIF. To the extent that the company needs to hire employees for positions and locations affected by the RIF within the one-year period following the RIF, the company should consider re-hiring those employees terminated due to the RIF before soliciting outside applications. Doing so will limit potential legal liability.

LABOR UNION ISSUES - If unionized employees are being considered for a RIF, the company must ensure that its actions are consistent with the National Labor Relations Act (NLRA) and the terms of any collective bargaining agreements with the union. Failure to comply with the NLRA's requirements or the terms of collective bargaining agreements can lead to significant liabilities and may even prevent the implementation of the RIF. Therefore, it is essential that the company address these issues before structuring or implementing the RIF if any union employees will be affected by the RIF.

OTHER EMPLOYMENT ISSUES

WARN Act - In addition to the issues discussed above, a potentially significant statute impacting any RIF decision is the Worker Adjustment and Retraining Notification Act (the WARN Act), 29 U.S.C. § 2101, et seq. The WARN Act is a statute designed to protect employees by requiring an employer to give advance written notice when an employer plans to conduct a "plant closing " or "mass layoff. " The WARN Act requires employers to give affected employees at least 60 days notice of such an employment action.

The WARN Act applies to any "business enterprise" that employs: (1) 100 or more employees, not including part-time employees; or (2) 100 or more employees (including part-time employees), who in the aggregate, work at least 4,000 straight time hours per week.

Under the WARN Act, a "plant closing" is a permanent or temporary shutdown of a: (1) "single site of employment", or (2) one or more facilities or operating units within a "single site of employment." To constitute a plant closing, the event must result in an employment loss for 50 or more employees (excluding part-time employees).

Under the WARN Act, a mass layoff is an employment loss (not including a plant closing) at a single site of employment of: (1) at least 33 percent of the active employees, excluding part-time employees, and (2) at least 50 employees, excluding part-time employees. Where 500 or more employees (excluding part-time employees) are affected by a mass layoff, the 33 percent requirement does not apply. The WARN Act regulations define an employment loss as: (1) an employment termination other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding six months in duration; or (3) a reduction in hours of work of individual employees of more than 50 percent during each month of any six month period. See 29 C.F.R. § 639.3(f). In determining whether the WARN Act applies to a given situation, employers are required to look at a 90 day period of time to assess whether a sufficient number of employees have been terminated or laid off in that time period to constitute a plant closing or mass layoff.

The WARN Act requires that written notice of the plant closing be provided to: (1) any representative of the employees affected by the action (i.e., the union); (2) each affected employee, if there is not an employee representative; (3) the chief elected official of the unit of local government where the job losses are planned to occur; and (4) the dislocated worker unit in each state where the job losses will occur. The WARN Act regulations provide that notice may be delivered by any method, provided that the method is designed to ensure that the affected parties receive notice at least 60 days before the separations begin.

A WARN Act notice must contain the anticipated date of the mass lay-off or plant closing. The date may be either a specific day or a 14-day period during which the separations are to begin. The notice may also specify whether layoffs are conditional based on the occurrence or non-occurrence of a particular event.
Generally, notice given to an individual nonunion employee must contain:

(1) a statement of whether the action is temporary or permanent and, if the entire plant is to be affected, a statement to that effect;
(2) the expected date the layoff or plant closing will begin and the date when the specific employee will be affected;
(3) an indication of whether bumping rights exist; and,
(4) the name and telephone number of the company official to contact for further information.

Employers that violate the WARN Act are liable to each employee who did not receive proper notice for back pay and benefits, including the cost of medical expenses that would have been covered under an employee benefit plan, for each day of the violation, up to the maximum of 60 days. These amounts can be reduced by: (1) wages paid by the employer to the employee during the period of the violation; (2) voluntary and unconditional payments to employees not otherwise required by any legal obligation; or (3) payments to third parties or trustees (premiums for health insurance benefits) on behalf of employees.

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The WARN Act may be enforced by a lawsuit filed by an employee in any US District Court where the violations occurred or in any jurisdiction where the employer conducts business. In addition, a union or the local government may sue on behalf of individual employees or on behalf of all of the affected employees collectively. The remedies specified in the WARN Act are exclusive. Courts have discretion to award attorneys' fees to prevailing parties. Courts are not permitted to bar a plant closing, or mass layoff that violate the statute.

Finally, an employer also may be liable to the local government for fines up to $500 for each day of the violation, up to a maximum of 60 days. However, these fines need not be paid if an employer pays each of the affected employees what it is liable for under the statute within three weeks of the date of the plant closing or a mass layoff. Where an employer is able to show that it acted in good faith and that it had reasonable grounds for believing its actions did not violate the statute, the court has discretion to reduce penalties and fines.

In addition to federal requirements pursuant to the WARN Act, many states have statutory requirements applicable to plant closings, mass lay-offs, or business relocations. State "mini-WARN " statutes may be triggered by fewer layoffs than under the WARN Act. Some states with such statutes include: Connecticut, Hawaii, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Oregon, South Carolina, Tennessee and Wisconsin. In addition, certain municipalities in the State of California, as well as the City of Philadelphia, Pennsylvania, have ordinances that may apply to a plant closing or mass layoff.

Obtaining releases from employees subject to the RIF - It is common practice for employers to attempt to obtain a release of potential claims from workers who are terminated due to a RIF. A release is a form of a contract in which the employee agrees to waive any legal rights and potential lawsuits in exchange for consideration from the employer. Consideration in this context means the employer has given the employee something of value that the company has no legal obligation to give to the worker. Consideration in most circumstances involves the payment of money. However, consideration is not limited to money; for example, it can include a letter of recommendation, payment of the employee's insurance premiums, or waiving a loan.

There are special requirements with respect to separation agreements, waivers, and releases for workers over the age of 40, due to a federal statute known as the Older Workers Benefit Protection Act of 1990 (OWBPA), 29 U.S.C. § 626. The primary purpose of the OWBPA is to ensure that employees over the age of 40 do not waive any potential age discrimination claims unless they do so knowingly and voluntarily. The OWBPA specifies minimum conditions that must be met before a release agreement is valid and enforceable, including:

(1) the release agreement must be written in a way that can be easily understood by the worker;
(2) the release must refer to rights or claims specifically arising under the age discrimination law (the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq.) so that the worker is made aware of their rights under this law;
(3) the worker cannot be asked to waive future claims that may arise after the date the release is executed;
(4) in return for signing the release, the employer must give the worker something of value above and beyond that to which he or she is already entitled (e.g., the worker must receive greater severance pay than normally required by any applicable employment contract);
(5) the worker must be advised in writing to consult with an attorney prior to executing the agreement;
(6) the worker must be given a period of at least 21 days within which to consider the terms of the agreement; and,
(7) the release must provide that for a period of seven days following the execution of the agreement, the worker has the absolute right to revoke the agreement if for any reason he or she has second thoughts and changes their mind (and the release will not become effective or enforceable until the revocation period has expired).

The OWBPA is even more onerous in its requirements if the release is proposed to a group of older workers in connection with a plant closing or a reduction in force. In this situation, each worker in the group or class of employees must be given a period of at least 45 days (not just 21 days) within which to consider the release agreement. Additional notice and disclosure obligations are also mandated concerning the ages and job titles of all persons affected by the group layoff. These notification memoranda are required by law to be furnished to every employee in the company (and not just those included in the RIF).

As should be apparent, the process of obtaining a release in the context of a RIF can be quite complex. Because strict compliance with the OWBPA's requirements is necessary to safeguard an employer's interests, obtaining a release from a worker over the age of 40 can be a difficult process. The OWBPA eliminates any possibility of getting a signed release on an immediate basis. An employee over 40 may sign the release immediately, but the employer cannot force the employee to do so; the OWBPA gives the worker a right to have up to 45 days to consider the offer in the RIF context.

One concern that is commonly raised by employers is that if a worker takes the proposed release to a lawyer within the 45-day period, the lawyer will advise the worker to pursue a strategy of threatening litigation to obtain more money from the employer. While this is a valid concern, employers are well-served in obtaining a release from terminated employees in the RIF context wherever possible.

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Obtaining a valid release of all potential claims by terminated employees, in exchange for valuable consideration, will help to prevent employees from later suing the company. Of course, providing severance packages to all of the employees terminated as part of a RIF can be an expensive proposition. However, if the company is considering offering some type of severance package to its employees in any event, the company should obtain a release of all claims against the company in exchange for the severance.

Severance pay - In return for a release of liability, a company can offer money to a terminated employee above and beyond what is owed in his or her final paycheck in exchange for a full release of claims against the company. This is usually the item of consideration that is most important to a departing employee. One week of pay for every year of service is customary in the private sector, although severance pay practices vary by industry and depend to a significant degree on an employer's particular philosophy, profitability and corporate culture. Nonetheless, careful consideration of contractual arrangements and severance pay practices is always crucial in termination settings even aside from other liabilities that might arise upon the cessation of employment.

Employment discrimination laws apply to all terms and conditions of employment. Severance pay practices are no exception. Any company making an offer of severance pay to a worker should ensure that the basis of a decision to provide one employee with a smaller severance package than that given to some other similarly-situated worker can be justified on the basis of a legitimate nondiscriminatory reason. Because severance pay calculated on years of service is easily justified as nondiscriminatory, many employers opt for such a formula to avoid charges of discrimination and as an equitable basis to distribute severance pay.

If the company decides to structure the RIF by offering severance pay in return for signing a release, this decision will impact significantly on the content of the written communications the company will be required to make to the entire work force when the RIF is announced.

Payment obligations - The company will be liable for any unpaid compensation accrued by affected employees, in addition to any wages, bonus payments, or other compensation owed. Of course, requirements vary under state law so an individual determination will need to be done with respect to employees in each state.

Benefit obligations and ERISA - The company also will be required to fully comply with any benefit obligations imposed under the terms of its employee retirement or welfare benefit plans, including any requirements pertaining to the withdrawal from such benefit plans. If the company fails to comply fully with its benefits obligations, it may be exposed to significant damages, penalties, fees and interest in an enforcement action brought under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. Therefore, the company's welfare or pension plans, if any, should be carefully reviewed by legal counsel in advance of the RIF.

COBRA - Under a federal law known as the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), 29 U.S.C. § 1161 et seq., an employer is required in most circumstances to provide a terminated employee with the opportunity to purchase replacement health insurance coverage. The law requires employers to give notice to employees of their right to buy replacement coverage for a period of up to 18 months.

Many employers tend to administer their health insurance plans through the use of a third-party administrator. These third-party administrators typically handle providing the required COBRA notice and offering continuing health care coverage to departing employees. However, the duty is that of the employer. If the company fails to fulfill its COBRA obligations, it may be exposed to significant damages, penalties, and fees in an enforcement action.

Unemployment insurance - Those employees who are terminated as a result of the RIF will likely file unemployment insurance claims. Under most state unemployment compensation laws, workers terminated as part of the RIF qualify for unemployment compensation, and such costs should be considered when planning the RIF. However, if employees voluntarily quit, employees generally are not entitled to unemployment compensation benefits.

Many states require that employers provide notice to their employees of their unemployment compensation rights upon termination. Contact information for the relevant State Unemployment Compensation Office should be included in the Contact Information Sheet for Employees.

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