



# Conducting Legal RIFs: What Employers Should Consider

Alex Gordon  
**Johns Hopkins Health System**

Fiona W. Ong  
Parker E. Thoeni  
**Shawe Rosenthal LLP**  
[www.shawe.com](http://www.shawe.com)

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# Agenda

1. Adverse Impact Analyses
2. Severance Agreements
3. WARN
4. Voluntary Retirement Incentive Programs
5. Best Practices for Communicating RIF Decisions

# Adverse Impact

- Title VII: In addition to prohibiting intentional discrimination, Title VII prohibits employers from implementing selection processes that have the effect of disproportionately impacting employees based on a characteristic protected by Title VII if the selection process is not job-related and consistent with business necessity
- ADEA: In addition to prohibiting intentional discrimination, the ADEA prohibits employers from implementing selection processes that have a discriminatory impact on employees over 40 years of age unless the employment action is based on a reasonable factor other than age.

# Adverse Impact- Title VII

- First, does the selection process have a disparate impact on employees of a particular protected characteristic?
- Second, if so, is the selection process job-related and consistent with business necessity?
- Third, if the answer to the first two questions is yes, is there a less discriminatory alternative available?

# Adverse Impact- ADEA

- If the selection process has an adverse impact based on age, the employer must show that the test was based on a reasonable factor other than age.
- Reasonable factor other than age is a lower bar than “business necessity.”

# Adverse Impact- Putting it all Together

Steps to follow (in this order):

- First, clearly document the business justification for the RIF
- Second, determine the selection criteria to be applied (e.g., tenure, performance rating, etc.)
- Third, apply the selection criteria to the “decisional unit”
- Fourth, analyze the impact of the application of the selection criteria using the “4/5ths Rule”
- Fifth, if there is disparate impact on a particular group, determine whether any less discriminatory alternative is possible

# Business Justification

- Articulate the reason for the RIF
  - Financial
  - Operational
- Be specific as to the reason for the reductions being made
  - For example, loss of \$5,000,000 in revenue resulted in need to cut costs. After reducing non-labor costs associated with generation of that revenue, labor costs must be reduced in the amount of \$3,200,000.



# Decisional Unit

- Determine the universe of employees/positions that will be considered for elimination
- This is not the group of employees who will lose their jobs, but the larger group of employees from which that group will be derived
- Perhaps all employees in the finance department, or all employees in the Company except the CEO

# Selection Criteria

- This is the criteria that will be applied to the decisional unit to determine which employees will be terminated in connection with the RIF
- Objective criteria reduce the risk of discrimination claims, but may not achieve business goals
- For example, choosing employees in a particular job category by tenure is unlikely to result in discrimination claims, but could leave the employer with less productive or more expensive employees

# Application of Selection Criteria

- Once the decisional unit and selection criteria are established, apply the criteria to the decisional unit, and document why each employee was chosen for termination.
- For example, in the accounting department, there are three data entry clerks. Sally was chosen rather than Bill and Sue because Sally has the least tenure (3 years as compared to 5 and 7 years for Bill and Sue, respectively).
- Consider including a relatively disinterested official (e.g., HR) in review of the application of the selection criteria to ensure it has been done fairly.

# Individual Selection

Also consider other “risk” factors:

- Use of FMLA leave
- Other legally protected characteristics:
  - ADA disability/reasonable accommodation
  - Pregnancy, sexual orientation, gender identity
  - Religion
  - Military leave/status
  - National origin
- Protected complaints (e.g. discrimination, harassment, whistleblowing)

# Adverse Impact Analysis

- Chart all employees in the decisional unit
  - Date of birth
  - Race/ethnicity
  - Sex/gender
- Analyze the rate of impact on employees of various classes
- EEOC rule of thumb to consider a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5ths) or eighty percent (80%) of the selection rate for the group with the highest selection rate as a substantially different rate of selection.

# Adverse Impact Analysis

## Steps

- Calculate the rate of selection for each group
- Identify group with lowest selection rate
- Calculate impact ratios (compare selection rates for each group)
- Ask whether the selection rate for any group is substantially less (4/5ths or 80%) than the selection rate for the highest group.
- If so, adverse impact is likely.

# Adverse Impact Analysis Example

<b>DECISIONAL UNIT</b>	Total	Selected for RIF	Rate of Selection	Comparison
<b>Scenario 1</b>				
Male	361	20	0.055401662	
Female	566	45	0.0795053	0.696829794
<b>Scenario 2</b>				
Male	361	25	0.069252078	
Female	566	40	0.070671378	0.979916898

# Less Discriminatory Alternative

If adverse impact is indicated, consider whether alternatives can alleviate impact

- Reduction of costs elsewhere (non-labor)
- Salary reductions as opposed to position eliminations
- Transfers to vacant positions, etc.



# Severance Agreements

- “Knowing and voluntary” – EEOC factors
- Express carveout for right to file EEOC charge
- Non-disparagement/confidentiality carveout for truthful statements to governmental agency

# Severance Agreements

Must comply with Older Worker Benefits Protection Act requirements for release of age claims under ADEA:

- 45 days to consider (can sign sooner, but not before last day). Include that modifications don't restart 45-day period.
- 7 days to revoke (cannot waive)
- Consult with attorney
- Information about severance program: decisional unit, eligibility factors, time limits, job titles and ages of those selected for program and those not selected

# Severance agreements

Comply with any state law requirements:

- Limitations on confidentiality/nondisclosure
- State-specific waiver language
- Notification of right to consult with attorney
- Time periods to consider and revoke
- Restrictions on no-rehire provisions

# Federal WARN

- Covered employers:
  - 100+ full-time employees
  - 100+ employees working an aggregate of >4000 per week, not including overtime
- Notice requirement:
  - 60 days' advance written notice of mass layoff or plant closing affecting 50 or more employees over a 90-day lookback period

## WARN Triggers

- Termination or mass layoff lasting 6 months or more at single site of employment:
  - At least 500 employees, excluding part-time
  - At least 50 full-time employees comprising at least 33% of active full-time employees
- Hours reduction > 50 percent for each month of any six-month period

# WARN Exceptions

- WARN does not apply to:
  - Layoff lasting less than 6 months
  - Temporary or seasonal project
  - Closure due to labor strike or lockout
- Exceptions to 60-day notice requirement, but give as much notice as possible:
  - Natural disaster
  - Faltering company
  - Unforeseeable business circumstances

# WARN Notice

- May be by email, mail, hand delivery
- Provided to:
  - affected employees,
  - union representatives,
  - State dislocated worker unit, and
  - Chief elected local officials

# WARN Notice

- Must contain:
  - Name and address of employment site, with name and telephone number of company official for contact
  - Statement as to whether planned action is permanent or temporary, and if entire plant is to be closed, to that effect
  - Date of first separation and schedule for additional separations
  - Union information and bumping rights, if any
- For unions and government officials, also:
  - Job titles and numbers of workers of affected positions



## Maryland Mini-WARN

- Was made mandatory effective October 1, 2020
  - But there was no enforcement pending regulations
- Revisions to Mini-WARN enacted in 2021
  - But there will be no enforcement pending regulations

## Mini-WARN

- Covered employers
  - 50+ employees operating an industrial, commercial or business enterprise in the State for more than one year
  - Employees outside Maryland count toward the coverage requirement

# Mini-WARN Triggers

Reduction in operations, meaning either:

- The relocation of part of its operation from one workplace to another, which may result in the reduction of the total number of employees by the greater of at least 25% or 15 employees; or
- The shutting down of a workplace or a portion of its operations that reduces the number of employees by the greater of at least 25% or 15 employees over a 3-month period.

# Mini-WARN v. WARN

- State Exceptions:
  - Employer's bankruptcy
  - NOT unforeseeable business circumstances
- Notice recipients are the same
- Notice contents
  - NOT union information or bumping rights

# Voluntary Retirement Incentive Programs

Plans may make distinctions based on age if ADEA exception applies

- Voluntary
  - Offer being too good to pass up or possibility of RIF do not render involuntary
- Consistent with purposes of ADEA
  - May offer all employees above a certain age an early retirement incentive because benefits older workers

# Voluntary Retirement Incentive Programs

- Issue notice to eligible employees outlining parameters of program
- Include form to elect whether to participate or decline
- Include severance agreement in package

# Best Practices

- Prepare script about decision – generic explanation
- In person meetings (if possible)
- Timing of meeting (end of day, while on leave)
- Be direct
- Be respectful

## Best Practices

- Be open to questions but stick to the script
- Have severance agreement in hand? Or email to all at same time (if concerned about disclosure of RIF list)?
- Take an overall look at corporate spending (no excess expenditures)
- Think about the public disclosure (internal communications disclosed to media)
- Consider a mutually agreed-upon statement as to reasons for departure in certain cases



# Questions

Fiona W. Ong

[ong@shawe.com](mailto:ong@shawe.com)

410-843-3471

Parker E. Thoeni

[pet@shawe.com](mailto:pet@shawe.com)

410-843-3466

Alex Gordon

[agordo37@jhmi.edu](mailto:agordo37@jhmi.edu)

410-502-0770