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## **Checklist: Preparing For Your Reduction-In-Force**

### **I. Develop a Plan**

- A. Voluntary or involuntary layoff?
- B. Explain and document need for layoffs.
  - 1. Elimination or Consolidation of jobs?
  - 2. Economic or technological change?
  - 3. Skill redundancy?
  - 4. Loss of business or contracts?
  - 5. Merger/sale/acquisition?
  - 6. Facility closing?
- C. Document business reasons through internal memos/presentations.
- D. Determine facilities/business units/functions will be affected.
- E. Determine number of employees/positions affected.
- F. Consider the impact on affected constituencies.
  - 1. Employees (former and remaining)
  - 2. Customers
  - 3. Investment community
  - 4. Media
  - 5. Governmental units
- G. Does the Company have a written RIF policy?
- H. Will the Company seek legal advice on RIF selection decisions?
  - 1. If so, send written request to counsel outlining that information will be submitted for legal review and so that counsel can provide legal advice to the Company on the RIF.
  - 2. Notify decision-makers of attorney/client privilege issues and that no RIF decision may be considered final and communicated to any affected employee until legal review is completed.

### **II. Timing Issues**

- A. Questions
  - 1. When will the layoff occur?

2. Have any of the affected employees recently engaged in protected activity?
  - a. FMLA or other protected medical leave?
  - b. Worker's compensation?
  - c. Made claims of harassment?
  - d. Made claims of discrimination?
  - e. Identified as disabled?
  - f. Made request for reasonable accommodation?
  - g. Made claims of failure to pay in accordance with the law?
  - h. Made claims of unlawful or unethical business practices?
  - i. Made any other complaints about workplace issues?
3. Has the Company considered imposing hiring, promotion, and transfer freezes on affected units, departments, or functions before the layoff occurs?
4. Has the Company considered laying off temporary and part-time staff or ending the assignments of contractors/subcontractors before laying off full time personnel?
5. Has the layoff already been announced? If not, when does the Company plan to announce?
6. If severance packages are being considered, when does the Company want to issue them?
  - a. Prior to termination?
  - b. On termination date?

### **III. Where Will the Layoff Occur?**

- A. Determine any applicable federal, state, or local plant shutdown or layoff notice requirements.
- B. Determine any state/local final pay timing, documentation, or format obligations.
- C. Determine whether there are any state/local unemployment obligations?

### **IV. Unionized Facilities**

- A. Obtain CBA for any unionized facilities.
- B. Determine effects/decisional bargaining obligations.
- C. Notice provisions in the CBA?
- D. Does the Company participate in a multi-employer union pension plan?

1. Be aware that the Company may incur partial or complete withdrawal liability upon plant closing or mass RIF.
2. If the Company withdraws from the multi-employer plan, it must make payments to the plan to make funding obligations for vested benefits.
3. The Company can request an “estimate” of withdrawal liability in advance of a withdrawal; however, it will be based upon the prior year’s actuarial valuation.

## **V. Company Information Needed to Prepare for a RIF**

- A. Review direct RIF-related materials.
  1. Written RIF policy/procedure.
  2. Severance policy/procedure.
  3. Seniority policy/procedure.
  4. Termination policy/procedure.
  5. Collective bargaining agreements.
  6. Documentation from other RIFs within the last three years: If the Company is going to use a different procedure from that used in the past, document the change.
- B. Review indirect RIF or termination-related materials for impacted employees
  1. Vacation payout policy/procedure
  2. Employment contracts
  3. Non-compete agreements
  4. Confidentiality agreements
  5. Arbitration agreements
  6. Offer letter
  7. Organizational chart (before the RIF and after)
- C. Prepare complete employee demographic information in a file that includes data on each of the employees within the decisional unit (the group of employees who were considered by decision-makers for possible layoff). Data file should contain (at a minimum):
  1. Employee name or employee identification number.
  2. Job title
  3. Location
  4. Department
  5. Division
  6. Date of birth

7. Race/ethnicity
8. Gender
9. Date of hire
10. For an involuntary RIF, whether the employee is selected or not selected.
11. For a voluntary RIF, whether the employee is eligible (or not) to take the severance package.

## **VI. Voluntary Separation Program, Involuntary RIF, or both?**

- A. Consider offering a voluntary RIF with special benefits first.
- B. Use involuntary RIF if the Company does not get enough volunteers.

## **VII. Choose Selection Process for a Voluntary Separation Program (VSP)**

- A. Eligibility
  1. Length of service
  2. Performance
  3. Organizational/departmental unit
  4. Job function
  5. Compensation level
  6. Exempt, salaried, or hourly status
  7. Offer the VSP across a wide-spectrum of employees to avoid discrimination claims. (All employees in the affected unit if possible).
  8. Anyone exempted out of voluntary program? Define this group carefully.
- B. Window Periods
  1. Is the period long enough to give employees a sufficient opportunity to reflect on whether to take part in the VSP? (Preferably 30 days).
- C. Incentives
  1. Does the Company plan to incentivize the VSP (i.e., making it more lucrative to volunteer than to be selected involuntarily)?
  2. Make sure your incentive plan will not violate the ADEA and OWBPA.
    - a. Flat-dollar incentives (e.g. \$20,000)
    - b. Service based benefits (e.g. \$1,000 X number of years of service)
    - c. Percentage of salary
    - d. Flat dollar increases in pension benefits (e.g. \$200 per month)
    - e. Percentage increases in pension benefits
    - f. Imputation of years of service for pension benefits

3. Has the Company presented the VSP as an *option* and stressed that eligible employees are under no obligation to accept?
4. Will the incentives be inside the pension plan or outside the pension plan?
  - a. If inside the pension plan, consider all applicable IRS and qualification rules.
  - b. Outside the pension plan, consider enhancements to nonqualified deferred compensation, retiree medical benefits, and severance benefits.

## **VIII. Choose Selection Process for an Involuntary RIF**

### **A. Decision-makers**

1. Do the decision-makers have functional leadership over the affected units?
2. Are the decision-makers the people in the best position to review selections and explain the decision to a jury or in a deposition?
3. Make sure the decision-makers are educated on legal requirements and they are familiarized with any applicable Company policies affecting selection decisions. This should be done before any selection decisions are made. Document that decision-makers are instructed NOT to consider any protected characteristics in making RIF decisions.

### **B. Seniority Considerations**

1. Overall seniority?
2. Within a department?
3. Within a job or classification?
  - a. Impact of employees recently transferred into the job or classification.
  - b. Impact of newly hired employees in the job or classification.
  - c. In reviewing the impact of the above, consider arguments that employees will make if all the layoffs take place in jobs or classifications other than the jobs or classifications held by the transferred or newly hired employees.

### **C. Merit Considerations**

1. Criteria to be used
2. Objective vs. subjective
  - a. If possible, use objective criteria.
3. Use of disqualifiers (attendance, disciplinary actions, etc.)
4. Use of previous evaluations

- a. Be wary of past performance reviews. Generally, they are not completed with the needs of a RIF in mind.
- 5. Use of new evaluations specifically designed for the layoff
  - a. If using new evaluation methods, write guidelines for completing those evaluations with the assumption the evaluations will be shown to a jury.
  - b. Train decision-makers on the new guidelines before any RIF selection decisions are made.
- 6. Current Company needs versus future needs
- 7. Tie breakers
- 8. Who performs ratings?
- 9. Review of ratings
- 10. Documentation requirements
  - a. Will decision-makers be required to document their evaluations?
  - b. If so, will forms be developed for decision-makers to use to support selection decisions?
- 11. Document retention guidelines
  - a. Will draft documents be retained or purged under the Company's Document Retention Policy?
  - b. Who will retain final copies of RIF supporting documentation?
- 12. Analysis of impact of merit selections on age, race, gender, etc. Ensure that this analysis is done within the attorney-client privilege and that employees who consult with counsel understand the obligation to maintain confidentiality/privilege.

## **IX. NAFTA/Trade Act Issues**

- A. Is the work being relocated outside of the U.S.? Where?
- B. Are the layoffs a result of foreign competition?
- C. Potentially applies if work transfers/lost to non-U.S. location.
- D. Does the Company wish to pursue federal training program assistance?

## **X. Federal WARN Applicability**

- A. Mass layoff
  - 1. More than 500 at one facility, or
  - 2. 50 or more and greater than 1/3 of employees at single employment site?
- B. Plant shutdown

1. Entire facility? Minimum of 50
2. Operating unit? Minimum of 50
- C. Look forward and back (30 and 90-day aggregation periods).
- D. WARN Notice
  1. Has the sixty-day notice requirement been fulfilled?
  2. Does the situation meet one of the exceptions to the WARN notice requirement?
    - a. Actively seeking capital or business that would postpone the closing? (This exception applies to plant closings but not to mass layoffs and will be strictly construed.) If this exception applies, as much notice as is practicable in the circumstances must be given.
    - b. Does the RIF result from business circumstances not reasonably foreseeable? (This exception applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.) If this exception applies, as much notice as is practicable in the circumstances must be given.
    - c. Is the layoff a result of a natural disaster? (This exception applies to plant closings and mass layoffs due to any form of a natural disaster.) If this exception applies, as much notice as is practicable in the circumstances must be given.
  3. Remember to continue benefits during the WARN notice period.
- E. Questions
  1. How many employees will be laid off? Remember to distinguish between full-time and part-time employees as that phrase is defined in WARN.
    - a. Have there been any other recent layoffs or others expected?
    - b. Any employees currently on layoff?
    - c. How many total employees will be laid off at each site?
  2. Will the layoff affect employees at other facilities?
    - a. How?
    - b. How many?
    - c. Relative locations?
    - d. Are the layoffs occurring at a “single site of employment”?
      - i. If more than one site:
        - (1) What are the geographic locations of the other sites?

- (2) Are the contiguous or located relatively close to each other?
  - (3) If not contiguous, are they located in the same general geographic area? If so, do employees work interchangeably at all of the sites? Is there a common management, administrative, and/or HR function for the sites in the same geographic areas?
- 3. How many employees are at the facility or facilities in question?
- 4. If a layoff occurs at a facility, and the whole facility is not being shut down, is the layoff occurring in a discrete “operating unit?”
- 5. To determine if it is an operating unit, ask the following questions:
  - a. Is this a specific department, unit (production line), or division being closed or relocated?
  - b. Are the employees being laid off part of a business being closed or relocated?
  - c. Does the layoff affect an organizationally or operationally distinct product or a specific work function?
- 6. How many other layoffs have taken place in the last 90 days? How many are anticipated in the 90 days following the planned layoff?
- 7. Check for state WARN statutes. Some have more stringent requirements than the federal Act. (CA, IL, NJ, NY, NH, IA, CT, etc.).

## **XI. Severance**

- A. Applicable Severance Policies/Procedures
  - 1. Will severance be paid to the RIFed employees?
  - 2. Is there already a Company policy or ERISA plan covering the severance?
    - a. Be careful, the practice of giving severance may qualify as an ERISA plan.
    - b. Consider whether there is any advantage to establishing an ERISA severance plan in this context and what compliance obligations are required.
  - 3. Do any employees have individual employment agreements that might have a severance provision or otherwise affect a RIF decision?
  - 4. Does the Company want to follow the current severance plan/policy or does the Company want to do something different?
- B. Release Issues
  - 1. If severance pay is made, does the Company want to get a release of claims?



- a. It is strongly recommended that any severance package be preconditioned on signing a release.
  2. If the company wants a release of claims, and there is a severance policy, is a release of all claims contemplated by any Company policy?
  3. If not, is the Company willing to increase the severance amount to get a valid release?
  4. What specific terms does the Company want to put in the release?
  5. When does the Company want to issue the packages?
    - a. If the Company chooses to stretch out severance payments, be aware that continuing payments over too long a period could result in the severance package being considered a pension plan under ERISA.
    - b. Severance payments exceeding the value of two years' salary would cause the package to be considered an ERISA pension plan.
  6. When does the Company want the releases signed? (Employees should not be permitted to sign releases prior to the last day of employment.)
  7. Are there 409A issues?
    - a. Payments earned and vested in one year, but not paid until a subsequent tax year, may be subject to tax penalty if they do not comply with 409A.
    - b. Severance payments may be excluded from section 409A if payable upon an involuntary termination or pursuant to a window program provided the severance amount does not exceed two times the lesser of the individual's annual compensation for the preceding year or the tax-qualified pension compensation limit and is paid out by the end of the second year after the termination of employment.
    - c. Under the short-term deferral exception to section 409A, compensation paid upon involuntary termination within two and a half months after the end of the year in which it vests will be exempt from the provision. Because lump sum payments vest when termination occurs, those payments will be exempt from section 409A provided they are paid within the short-term deferral period.
    - d. If a publicly traded company, consider whether the Company needs to delay for six months the payment of any 409A deferred compensation to key employees.
  8. Different releases for over 40/under 40 groups?
- C. Miscellaneous
1. What is the Company's position if employee wants to leave early?

2. How to handle vacation, 401(k), etc.
3. Qualified retirement plan (pension and 401(k)) concerns.
  - a. Depending on the number of pension participants RIFed, a partial termination of the plan may occur.
  - b. General rule of thumb – termination of twenty-percent of plan participants may be considered a partial termination, requiring all affected participants in the plan to be one hundred-percent vested.
  - c. Has the Company considered fully vesting all participants?
4. Has the Company considered COBRA obligations?
  - a. If the Company has more than 20 employees, it is required to offer terminated employees who are covered by the plan on the date of termination the option of continued group health coverage. Applies to all ERISA group health plans, which may include medical, dental, vision, health flexible spending arrangements, health reimbursement arrangements, wellness programs, and employee assistance programs.
  - b. The Company has thirty days to notify the plan administrator of the termination of the employment.
  - c. The plan administrator has fourteen days to provide a COBRA election notice to the qualified beneficiaries.
  - d. Failing to provide timely notice may result in daily penalties under ERISA per individual for each day the notice is late.
  - e. If the company is subsidizing the COBRA rate, require employees to timely elect COBRA and request reimbursement for no longer than the applicable COBRA period to avoid paying deferred compensation subject to 409A.
  - f. Consider whether the COBRA subsidy available under the American Recovery and Reinvestment Act of 2009 will be available to affected employees.
    - i. If so, determine how the subsidy can be coordinated with any subsidized COBRA coverage provided.
    - ii. If available, the federal subsidy allows the beneficiaries to receive up to 9 months of COBRA at 35% of the applicable premium.
5. How to handle retirement/severance overlap?
6. WARN implications on severance and release.
7. When will the Company notify employees selected for the reduction who are on leave?

- a. It is recommended that these employees at the same time all other employees are notified, unless to do so would be medically harmful.

## D. OWBPA Concerns

1. If it is a voluntary RIF, what are the eligibility requirements for volunteering?
2. Decisional Unit:
  - a. What is the scope of the employee population looked at, for selections in an involuntary RIF or for determining the eligibility for a voluntary layoff?
  - b. At what corporate levels will the selection/eligibility decision occur?
  - c. At what level will the decisions be reviewed?
  - d. Will the decision be focused on:
    - i. A particular facility?
    - ii. Part of a particular facility, such as a RIF focused on a particular plant department?
    - iii. A line of business that comprises subparts at various Company locations, such as accounting department, personnel who report back to a main office, or sales department personnel?
    - iv. A RIF focused on a particular job classification, either at a facility or throughout the Company or division?
3. Age/Job Data Concerns
  - a. Obtain age/job title/department.
  - b. Verify proper job classifications used.
    - i. Current, not future
    - ii. Levels "I" or "II," "A" or "B," etc.
  - c. Evaluate proper sorting of list.
  - d. Age information issues
    - i. Eligibility concerns
    - ii. Deadlines for decisions
4. Waiver Issues
  - a. Does the waiver specifically waive ADEA claims?
  - b. Is it written in clear language?
  - c. Has the Company offered additional consideration for the waiver?

- d. Has the Company advised the employee in writing to consult an attorney?
- e. Has the Company given affected employees at least forty-five days to consider the offer? (Remember mailing requirements when calculating 45-day period.)
- f. Has the Company given the affected employee seven days following the execution of the waiver to revoke the agreement? (The Company is only required to allow employees to revoke their agreement to release age claims. There is no right to revoke the agreement as to all other claims).
- g. Has the Company investigated whether the law of the state where the employee works requires additional language or procedures (*See e.g.*, California, West Virginia, and Minnesota)?
- h. Do not include the OWBPA itself in the list of statutes covered by the waiver of claims.
- i. Prepare a narrative form for use on the OWBPA disclosures:
  - i. A description of the decisional unit.
  - ii. A description of the “eligibility criteria” for the RIF.
  - iii. A description of the “selection criteria” for the RIF.

## **XII. Program Document**

- A. Unionized
  - 1. Bargain with the union to get a Memorandum of Understanding (MOU).
  - 2. Stress advantages.
- B. Non-Union
  - 1. Program document contents
    - a. Justification for RIF
    - b. Establish project team.
    - c. Timing
    - d. Announcements
    - e. WARN notification requirements
    - f. Selection process
      - i. Voluntary
        - Eligibility requirements
      - ii. Involuntary
        - Selection criteria

- g. Recall issues
- h. Transfer of supervisors to hourly positions
  - i. Applicable supervisory policies
- i. Transfers of employees to other locations
- j. Contract or temporary employees
- k. Establish review/complaint process.
- l. General guidelines
  - i. EEO
  - ii. Whistleblower issues
  - iii. Retaliation issues

2. Stress advantages

### **XIII. Adverse Impact Analysis**

- A. In conjunction with legal counsel, conduct statistical analysis of overall selections based on merit.
  - 1. Age
  - 2. Race
  - 3. Sex
  - 4. National Origin
- B. Analyze for possibility of disparate impact and individual disparate treatment claims based upon logical comparators in similar jobs, classifications, etc.
- C. Is the Company prepared to reconsider selections based on the results of the legal review? If not, make sure there is adequate justification for each selection.

### **XIV. Communications**

- A. Within the facility
- B. Notice to affected employees
  - 1. Train individuals who will do individual notifications.
    - a. Purpose and scope
    - b. Method for making selections
    - c. Transfer or relocation possibilities
    - d. Explain benefits.
      - i. Severance
      - ii. Health coverage termination date/COBRA commencement/COBRA subsidy if available

- iii. Unemployment compensation
- iv. Outplacement
- v. EAP (if one exists)
- vi. Life and disability insurance – confirm with broker whether individual conversion right exists and deadline for employees to convert, as well as who will communicate.
- vii. Flexible benefit and/or cafeteria plan
  - (1) If health FSAs, explain any claims run-out period and COBRA rights.
  - (2) If dependent care FSAs, explain claims run-out period.
- 2. Where will notification be made?
- 3. Establish time schedule.
- 4. Two management representatives present
- 5. HR personnel available for follow-up questions
- 6. Avoid arguments.
- 7. Explanation of internal complaint mechanism (if one exists)
- 8. Take notes
- 9. Exit plan
- C. Public announcement
  - 1. PR Issues
  - 2. Written announcements consistent with the business reason for RIF?

## **XV. Unemployment Issues**

- A. Company's preference on employee's receipt
- B. Review state laws to evaluate ability to meet Company's preference.
  - 1. Does the Company want the employees to be able to draw unemployment compensation during the severance period? If so, state law considerations for the payment of unemployment must be considered. Some states will not allow employees to draw unemployment if they are receiving severance pay. Other states will allow it if it is a bonus as opposed to a payout.
  - 2. Consider notifying the state unemployment office of the RIF. It will give the office lead time to prepare for the incoming claims.

## **XVI. Outplacement**

- A. Questions

1. Has the Company considered providing outplacement assistance such as career counseling or resume updating to laid-off employees?
  - a. Provide or reimburse for no longer than end of second year after termination to avoid creating 409A deferred compensation.
2. Does the Company have an EAP program in place or hotline that laid-off employees can call for information or assistance? Does it terminate when active employment terminates? Is the program subject to ERISA and COBRA?

## **XVII. Timeline for Action Completion**

- A. Include this timeline in the Program Document/Memo of Understanding.
- B. The document should include deadlines for completion of RIF-related tasks.

## **XVIII. Create the Package**

- A. Program Document or MOU
- B. ERISA Documents
  1. Plans amendments, SPDs, SMMs, or
  2. Other documents supporting variance from standard SPD
- C. Severance Package
  1. Cover letter
  2. Release
  3. OWBPA disclosures
  4. Acknowledgment of receipt
- D. WARN Documents
  1. Individual employee notifications (non-union)
  2. Bargaining agent notifications (union)
    - a. Local, and
    - b. International
  3. State dislocated worker unit
  4. Local political head
    - a. County and/or
    - b. City/Town
- E. Communication Package
  1. Company schedule of events (not for dissemination)
  2. Bulletin board notice

3. Meeting scripts
  - a. General meeting
  - b. Individual meetings
4. “Question & Answer” sheets
5. Press release
6. Employee information package
  - a. Used on date of announcement
  - b. Contains
    - i. Severance package
    - ii. Explanatory letter (if severance package not to be issued)
    - iii. WARN notice (at least 60 days in advance of RIF)
    - iv. Benefits summary

If you have any questions about this form, please contact: Charles B. Baldwin | Indianapolis, IN | Telephone: 317-916-2140 | E-mail: [charles.baldwin@ogletree.com](mailto:charles.baldwin@ogletree.com); Gretchen W. Ewalt | Raleigh, NC | Telephone: 919-789-3173 | E-mail: [gretchen.ewalt@ogletree.com](mailto:gretchen.ewalt@ogletree.com); David J.B. Froiland | Milwaukee, WI | Telephone: 414-239-6412 | E-mail: [david.froiland@ogletree.com](mailto:david.froiland@ogletree.com);

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