
The Do's and Don'ts of Reductions in Force

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Advancing the Association Community in California

What to Take Away From Today's Presentation

- ▶ Obtain an understanding of reductions in force and why they are necessary
- ▶ Overview of California and federal law governing reductions in force
- ▶ Best practices in successfully conducting workforce reductions and avoiding litigation

Understanding Reductions in Force (“RIF”)

- ▶ What are RIFs?
 - ▶ The name speaks for itself – reducing the work force
 - ▶ Other common names
 - ▶ Downsizing
 - ▶ Layoffs
 - ▶ Staff reduction

Understanding RIFs

- ▶ Why are RIFs necessary?
 - ▶ Economy
 - ▶ Sale of company or mergers
 - ▶ Technology
 - ▶ Over staffing
 - ▶ Slow sales or production
 - ▶ Bankruptcy
 - ▶ Plant closures
 - ▶ Relocations

California and Federal Law Governing RIFs

- ▶ Does the California or federal Worker Adjustment and Retraining Notification Act (“WARN”) apply?
 - ▶ California WARN Act, Labor Code section 1400, et seq.
 - ▶ Federal WARN Act, 29 U.S.C. section 2101, et seq.

California WARN Act

- ▶ Labor Code section 1400, et seq.
 - ▶ Who is covered by the Act?
 - ▶ Any industrial or commercial facility that employs, or has employed within the preceding 12 months, 75 or more persons. (Lab. Code § 1400(a))
 - ▶ Employer – any person who directly or indirectly owns and operates a covered establishment. (Lab. Code § 1400(b).) Includes a parent corporation

California WARN Act

- ▶ Who is covered by the Act?
 - ▶ “Employee” is a person employed by an employer for at least 6 months of the 12 months preceding the date on which notice is required under the Act. (Lab. Code § 1400(h).)
 - ▶ Does not distinguish between part-time or full-time employee. Both qualify if the above condition is met
 - ▶ The Act does not apply to seasonal employees where those employees are hired with the understanding that their employment is seasonal and temporary. (Lab. Code § 1400(g)(2).)

California WARN Act

- ▶ Who is not covered by the Act?
 - ▶ Seasonal employees where those employees are hired with the understanding that their employment is seasonal and temporary. (Lab. Code § 1400(g)(2).)
 - ▶ With certain exceptions, layoffs involving employees hired for a particular project. (Lab. Code § 1400(g)(1).)

California WARN Act

- ▶ What constitutes a Mass Layoff under the Act?
 - ▶ A layoff during any 30-day period of 50 or more employees at a covered establishment. (Lab. Code § 1400(d).)
- ▶ What is a relocation under the Act that would require notice?
 - ▶ Removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 or more miles away. (Lab. Code § 1400(e).)

California WARN Act

▶ Notice Requirements

- ▶ 60 days prior to mass layoff taking effect (Lab. Code § 1401(a).)

▶ Who Has to Be Notified?

- ▶ The affected employees of the covered establishment (Lab. Code § 1401(a)(1));
- ▶ EDD
- ▶ Local workforce investment board
- ▶ Chief elected official of each city and county government which the termination, relocation or mass layoff occurs (Lab. Code § 1401(a)(2).)

California WARN Act

- ▶ Other Notice Requirements
 - ▶ The notice must include the necessary elements required under the federal WARN Act (Lab. Code § 1401(b).)
- ▶ Notice is not required if a covered establishment closes as a result of a natural disaster or act of war. (Lab. Code § 1401(c))

California WARN Act

- ▶ Exemptions from Notice Requirements (Lab. Code § 1402.5)
 - ▶ Employer is actively seeking capital or business
 - ▶ The capital or business would have enabled the employer to avoid terminations or relocation if it had been obtained
 - ▶ Employer had a reasonable good faith belief that giving notice as required would have prevented the employer from obtaining the needed capital or business

California WARN Act

- ▶ **Employer Liability for Failure to Comply (Lab. Code § 1402)**
 - ▶ Back pay to each employee affected
 - ▶ Average regular rate of pay based upon last three years of compensation or the final rate of compensation, whichever is higher
 - ▶ Value of benefits employees would have been entitled to
 - ▶ Maximum liability is up to 60 days, or one-half the number of days the employee was employed, whichever is smaller
 - ▶ Mitigation

California WARN Act

- ▶ **Employer Liability for Failure to Comply**
 - ▶ Civil action by affected employees (Lab. Code § 1404)
 - ▶ Individual
 - ▶ Class actions
 - ▶ Prevailing plaintiff entitled to recover his or her attorney's fees

Federal WARN Act

- ▶ 29 United States Code section 2101, et seq.
- ▶ Who is covered by the Act?
 - ▶ “Employer” is a business enterprise that employs
 - ▶ 100 or more employees, excluding part-time employees
 - ▶ 100 or more employees who in the aggregate work at least 4,000 hours per week, exclusive of overtime (29 U.S.C. § 2101(a)(1)(A)-(B))
 - ▶ Individuals are not “employers” under the Act. (*Cruz v. Robert Abbey, Inc.* (E.D.N.Y. 1991) 778 F.Supp. 605)

Federal WARN Act

- ▶ Who is covered by the Act? (Con't)
 - ▶ Seasonal employees with a reasonable expectation of being recalled (*Marques v. Telles Ranch, Inc.* (9th Cir. 1997) 131 F.3d 1331.)

Federal WARN Act

- ▶ Actions requiring notice under the Act
- ▶ Plant closings
 - ▶ Temporary or permanent shutdown of a single site, or one or more facilities/units within a single site
 - ▶ Employment loss during any 30-day period of 50 or more employees exclusive of part-time employees (29 U.S.C. § 2101(a)(2))

Federal WARN Act

- ▶ Mass layoffs that do not result in plant closure; and results in employment loss at a single site during any 30-day period for:
 - ▶ At least 33% of the employees, exclusive of part-time employees; and
 - ▶ 50 or more employees, excluding part-time employees (29 U.S.C. § 2101(a)(3)(B)(i)(I)-(II))

Federal WARN Act

- ▶ Mass layoffs that do not result in plant closure; and results in employment loss at a single site during any 30-day period for:
 - ▶ At least 500 employees, excluding part-time employees (29 U.S.C. § 2101(a)(3)(B)(ii))

Federal WARN Act

- ▶ Part-time employees not covered by the Act
- ▶ Part-time employees are defined in the Act as:
 - ▶ An employee who is employed for an average of fewer than 20 hours per week; or
 - ▶ An employee who has been employed for fewer than 6 of the 12 months preceding the date on which notice under the Act is required. (29 U.S.C. § 2101(a)(8)).

Federal WARN Act

- ▶ Notice Requirements
- ▶ 60-days notice
- ▶ To Whom Notice Must be Provided
 - ▶ Affected employees or their representative
 - ▶ State or state entity designated by the State to carry out rapid response under 29 U.S.C. § 2864(a)(2)(A); and
 - ▶ Chief elected official of the unit of local government within which such closing or layoff is to occur.

Federal WARN Act

- ▶ Reductions of, or exclusions from, Notice Requirements
 - ▶ Employer actively seeking capital or business, which if obtained, would have enabled the employer to avoid or postpone the shutdown; and
 - ▶ Employer reasonably believes that giving the required notice would have prevented it from obtaining the capital or business sought (29 U.S.C. § 2102(b)(1)(A))

Federal WARN Act

- ▶ Reductions of, or exclusions from, Notice Requirements
 - ▶ Business circumstances were not reasonably foreseeable to the employer at the time the required notice would have been required. (29 U.S.C. § 2102(b)(2)(A))
 - ▶ Plant closing or mass layoff is the result of a natural disaster. (29 U.S.C. § 2102(b)(2)(B))

Best Practices in Conducting RIFs

- ▶ Unfortunately, even the best planning may not prevent a lawsuit
 - ▶ Disgruntled employees
 - ▶ May see increase in workers compensation claims or request for FMLA or CFRA leave
 - ▶ Employer's best intentions may have a disparate impact on protected class(es) of employee(s)
 - ▶ Minimize costs with proper planning and execution

Considerations in Implementing RIFs

- ▶ What is the goal of RIF?
 - ▶ Cut costs
 - ▶ Increase production
 - ▶ Increase efficiency and quality
 - ▶ Improving service
- ▶ What alternatives were considered by the employer prior to concluding RIF was the best course of action? Have these alternatives been documented?
- ▶ Will the RIF require notice under California or federal WARN Acts?

Considerations in Implementing RIFs

- ▶ What criteria is going to be used to determine which employees to let go?
- ▶ Who will be the affected employees?
 - ▶ An entire plant, facility, department?
 - ▶ Are the cuts/lay-offs going to be across the board?
 - ▶ Is there a discriminatory impact?
- ▶ How will the message be delivered and by whom?
- ▶ Timing of RIF
- ▶ Cost vs. Benefits

Best Practices in Conducting RIFs - The Do's

- ▶ Consult with legal counsel
- ▶ Document the reasons for RIF, including other alternatives considered
- ▶ Develop objective criteria to assess the affected employees geared towards meeting the employer's goal in implementing the RIF and document it
 - ▶ Seniority;
 - ▶ Elimination of job functions;
 - ▶ Production;
 - ▶ Skill level

Best Practices in Conducting RIFs – The Do's

- ▶ Review the tentative list of affected employees
- ▶ Train the individuals who will deliver the message
 - ▶ prepare a script
 - ▶ How to handle response from employee
 - ▶ Be honest and forthright
- ▶ Prepare a checklist to ensure that all affected employees have been provided all necessary notices, if required, and information concerning benefits such as COBRA, 401k, etc.

Best Practices in Conducting RIFs – The Do's

- ▶ Advise the employees of the RIF even if not required under state or federal WARN Acts. Give it a personal touch. Allow questions to be asked or concerns vetted.
- ▶ Meet with the affected employees individually, if practical. A personal touch, despite the circumstances, may give the affected employee a sense that he or she matters.
- ▶ Keep morale positive for those employees not affected by the RIF
- ▶ If severance packages are going to be offered, make sure to obtain a release from the affected employees clearly identifying the rights being released

Best Practices in Conducting RIFs –The Don'ts

▶ Don't discriminate

- ▶ Keep in mind that the employer's burden in a wrongful termination or discrimination suit is to demonstrate a "legitimate, non-discriminatory reason for the adverse employment action"
- ▶ If a disproportionate number of potential employees affected by the RIF are members of a protected class – age, race, national origin, sex, gender – the employer needs to re-think the criteria used
- ▶ Don't use a RIF as a pretext to terminate an employee that you view as a problem

Best Practices in Conducting RIFs – The Don'ts

- ▶ Don't use criteria such as performance in determining who will be the affected employees unless you have supporting documents for the performance-related issues
- ▶ Don't keep the affected employees in the dark about the RIF
- ▶ Don't lay off more employees than is necessary to accomplish goal
- ▶ Don't re-hire individuals for positions that have been eliminated by RIF

Other Issues Presented with RIFs

- ▶ What about employees on leave at time of lay off?
Can the employer include these individuals in RIF without liability?
 - ▶ The employer can lay such an individual off, provided the layoff is not related to, or because of, the reason for taking the leave.
 - ▶ However, even though the RIF is legitimate, that may not stop an affected employee from filing suit claiming retaliation or wrongful termination because of his or her leave

Questions?

▶ Contact

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