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**LAYOFF LITIGATION:
ISSUES TO KNOW IN A ROUGH ECONOMY**

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Avoiding Employment Law Claims in a Struggling Economy

- Engaging in cost-cutting without increasing exposure to claims
- Understanding employee rights regarding reductions-in-force and layoffs
- Mitigating risk for staff reductions
- Maintaining up employee morale
- Keeping up to date with ever-changing laws

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Employment Trends Remain Bleak

- According to Forbes.com's Layoff Tracker as of October 9, 2009, the number of layoffs since Nov. 1, 2008, at America's 500 largest public companies is 610,873.

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Employment Trends Remain Bleak

- The Bureau of Labor Statistics: Employers initiated 2,994 mass layoff events in the second quarter of 2009 that resulted in the separation of 534,881 workers from their jobs for at least 31 days. Both the numbers of extended mass layoff events and associated separations were record highs for a second quarter since 1995.

Employment Trends Remain Bleak

- Nationally, payrolls are down 3.5 percent.
- According to the Labor Department, since Nov. 2008, the economy has lost 7.6 million construction jobs (down 20.3%), 2.1 million manufacturing jobs (down 15%) and 550,000 financial sector jobs (down 6.7%).

Types of Job Actions

- Plant Closings
- Mass Layoffs
- Job Eliminations
- Reorganizations
- Furloughs

Cost Cutting Considerations

- Assess the business needs for terminating a large number of employees

- Cutting non-personnel costs: (supplies, corporate travel, advertising and corporate sponsorships, suspending new initiatives)

Cost Cutting Considerations

- Cutting personnel costs:
 - Salary, incentive, commission or other compensation cuts or freezes
 - Reassess executive compensation plans
 - Health and Welfare benefit reductions
 - Reducing PTO and other benefits
 - Prohibiting overtime
 - Temporary shutdowns
 - Hiring freezes
 - Use of temporary workers
 - Voluntary exit incentive programs
 - Voluntary retirement programs

- *Be mindful of wage and hour concerns and contractual obligations*

Potential Reasons for Reductions in Force

- Financial Issues
 - Bankruptcy
 - Cost control/cost cutting/increase profitability
 - The "Economy"
- Financial difficulties
 - External Crisis
 - Product recall
 - Weather/Natural disaster
 - Hazardous work environment
- Seasonal Industry

Potential Reasons for Layoffs

- Business Demand
 - Contract cancellation/completion
 - Insufficient demand
- Organization Changes
 - New ownership
 - Restructuring/reorganization
 - Rightsizing/Lean Manufacturing

RIF Considerations

- What is the goal – reduce headcount or salary costs?
- What selection criteria will be used?
- What process will be followed?
- Assessing legal exposure.
- What benefits should be provided?
- How should the decision be communicated to employees, the media, the public?
- Impact on morale and productivity?

RIF Decision-Making

How many employees will be terminated?

- Do you want to do it all at once, or in stages?
- Do you want to plan one RIF conservatively, and then proceed to undertake another RIF, if still necessary?

RIF Decisionmaking

Determine the criteria, then apply them.

1. Define goals of the RIF
2. Articulate the criteria
3. Determine relative weight of multiple criteria
4. Identify and assign various levels of decision-makers

Discrimination Claims

- RIF decisions cannot be based on any protected characteristic or protected activity.
 - Under federal law, protected characteristics include race, color, religion, sex, national origin, age (over 40), pregnancy, union activities, disability, FMLA leave status, military status.
 - Under state and local laws, protected characteristics also include sexual orientation
 - Beware of potential retaliation claims

Types of RIF Discrimination Claims

- Disparate Treatment—Direct Evidence (“Smoking Gun”)
- Disparate Treatment—Indirect Evidence (“Pretext”)
- Disparate Impact
- Pattern or Practice

Disparate Treatment – Direct Evidence

- Direct evidence proves discrimination without the need for inference or interpretation.
- Statements by a person involved in the decision making process that reflect a discriminatory animus may constitute direct evidence.

Disparate Treatment – Direct Evidence

- *DiCarlo v. Potter*, 358 F.3d 408 (6th Cir. 2004) (supervisor referring to an older employee as “no spring chicken” and stating that he would not advance in the company because of his age)
- *Frank v. Xerox Corp.*, 347 F.3d 130 (5th Cir. 2003) (policy of reducing percentages of employees by race under a balanced work force initiative to ensure that all racial and gender groups were proportionately represented at all levels of the company)

Disparate Treatment – Direct Evidence

- *Fakete v. Aetna, Inc.*, 308 F.3d 335, 336 (3d Cir. 2002) (supervisor’s statement that he was “looking for younger single people”)
- *Rose v. N.Y. City Bd. of Educ.*, 257 F.3d 156 (2d Cir. 2001) (supervisor’s statement that he was looking to replace employee with someone “younger and cheaper”)
- *Gonnerman v. McHan Construction, Inc.*, 520 F. Supp. 2d 1095 (N.D. Iowa 2007) (supervisor’s statement that employee was “too old to do [his] work ... and complained too much”)

Disparate Treatment – Indirect Evidence

- Step Two—employer must articulate a legitimate non-discriminatory reason for the RIF:
 - reorganization/restructuring
 - business climate
 - financial considerations
 - cost cutting
 - performance reviews
 - sales/productivity
 - need for particular skills/abilities

Disparate Treatment – Indirect Evidence

- Step Three—Plaintiff has the opportunity to prove that the employer's stated reasons for the RIF decision was not the true reason for its actions but a mere pretext for unlawful discrimination.

Disparate Impact

- Under a disparate impact theory, plaintiffs can prove discrimination by showing that an employer's facially neutral RIF policies or procedures had an adverse impact upon a protected class.
- Applies to both subjective and objective decision making. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).
- Proof of discriminatory intent is not necessary. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
- Statistical evidence is used to support disparate impact claims.

Disparate Impact - ADEA

- Disparate impact theory available in ADEA cases, but harder to prove. *Smith v. City of Jackson*, 544 U.S. 228 (2005).
- ADEA plaintiff must identify a specific test, requirement, or practice that had a disparate impact on older workers. A generalized policy or practice will not suffice.
- The ADEA allows employers to take an employment action “where the differentiation is based on reasonable factors other than age.” Thus, unlike Title VII cases, there is no obligation under ADEA to look to whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class.

Disparate Impact

EEOC v. Allstate Ins. Co., 458 F. Supp. 2d 980 (E.D. Mo. 2006):

- The court granted partial summary judgment in favor of the EEOC in a representative action under the ADEA on behalf of a group of former employees who were terminated in a RIF. The EEOC alleged that the employer’s policy of not allowing them to seek other positions within the company after it reorganized was unlawful.
- The court found that the EEOC had demonstrated a *prima facie* case of disparate treatment discrimination as a matter of law, where 90 percent of the employees who would have been barred from being rehired were over 40, and that employees over 40 were impacted over 10 times the rate by which employees under 40 were impacted by the rehiring policy.

Disparate Impact

- The court turned to the “reasonableness inquiry” mandated by the Supreme Court in *Smith*. The court held that a plaintiff could prevail on a disparate impact case under the ADEA if it could prove that the factors other than age considered by the employer were unreasonable. 458 F. Supp. 2d at 988. The employer’s business justification for the no-rehire policy was to 1) avoid customer confusion when seeing former insurance agents working in different jobs within the company, 2) encourage former employee-agents to participate in the independent contractor program, and 3) avoid double-dipping of employees receiving both salaries and severance benefits.
- The court found there were issues of fact as to whether the policymakers reasonably considered the rationales before setting the policy. Therefore, the court declined to dispose of the “reasonableness” inquiry on summary judgment.

Disparate Impact

Pippin v. Burlington Resources Oil and Gas Co., 440 F.3d 1196 (10th Cir. 2006):

- The United States Court of Appeals for the Tenth Circuit held that the trial court properly granted summary judgment in favor of an employer and against a 51-year-old employee who alleged the employer illegally discriminated due to age.
- The employer alleged it fired the employee as part of an RIF and corporate restructuring in which the employer let go of its employees with the lowest past performance reports.

Disparate Impact

- The court found that the employee failed to show specific statistics on the number of over 40 employees laid off versus the number of under 40 employees laid off. Additionally, the employee was unable to show that the policy of dismissing the employees with the lowest past performance reports was unreasonable.
- The Court observed that the Supreme Court pointed out in *Smith v. City of Jackson* that the ADEA "significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'" 440 F.3d at 1200. Thus, an employer's potential liability for disparate impact under ADEA was significantly limited.

Pattern and Practice

- Unlike disparate impact claim, pattern and practice claims require proof of intentional discrimination.
- Plaintiffs must prove that discrimination was the employer's "standard operating procedure, i.e., the regular rather than the unusual practice." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Pattern and Practice

- To establish a prima facie case of a pattern and practice of discrimination, a plaintiff ordinarily must offer reliable statistical evidence, buttressed by evidence of general policies and specific instances of discrimination.
- If this burden is met, the employer has the burden of production to show that the challenged decisions were made for legitimate, nondiscriminatory reasons, or that the plaintiff's proof is inaccurate or insignificant.

Potential Claims for Wrongful Termination and, Retaliation

- Most federal and State employment statutes prohibit retaliation against employees who complain about violations of discrimination and other statutes. For example, 29 U.S.C. § 215(a)(3) prohibits retaliation against any employee who has raised concerns about violations of the wage requirements under the federal Fair Labor Standards Act ("FLSA").

Employees On Leave During A RIF

- **Family and Medical Leave Act (FMLA)**
 - The FMLA generally requires covered employer to give employees up to 12 weeks of leave for a qualifying family or medical reason, and generally entitles an employee to be reinstated to the same or equivalent position at the conclusion of the leave.
 - An employee on FMLA leave is not protected from discharge if the employee would have been laid off if he or she had remained at work, provided that the employer has no continuing obligations under a collective bargaining agreement or otherwise.

FMLA

- The employer's obligation to maintain group health plan benefits likewise cease at the time the employee is laid off.
- **Caution: the FMLA prohibits discrimination against employees who have used FMLA leave. Therefore, an employee's status on FMLA leave cannot be a consideration in deciding whether to select that employee for layoff.**

Employees On Leave During A RIF

Uniformed Services Employment and Reemployment Rights Act (USERRA)

- USERRA prohibits employment discrimination based on military service. 38 U.S.C. §4311
- USERRA also requires employers to reinstate employees returning from military service to the job that they would have attained had they not been serving in the military with the same seniority, status, pay and other benefits.

USERRA

- An employer is not required to reinstate a returning service member where the employer can show that its circumstances have so changed as to make reemployment impossible or unreasonable, or that reemployment would impose an undue hardship on the employer. 38 U.S.C. §4312.
 - This exception has been held to apply if the employer proves that the returning service member's job was eliminated in a RIF. See *Cole v. Swint*, 961 F. 2d 58 (5th Cir. 1992); *Anthony v. Basic Am. Foods, Inc.*, 600 F. Supp. 352 (N.D. Cal. 1984)

Union Issues

- Collective bargaining agreements may dictate how employees are selected in any workforce reduction. Such agreements often require that layoffs within any position be done by seniority and may establish bumping rights so that senior employees may transfer from a position that is being eliminated to another position that is filled by a less senior employee.

Union Issues

- An employer may be required to bargain over workforce reductions. An employer usually does not need to bargain over business decisions; however, it may need to engage in such bargaining if the purpose of the business decision is to reduce employee costs. Decision bargaining may be required if the union is in a position to negotiate over matters that go to the heart of the company's business justification. Even if an employer does not need to bargain over its decision, it normally must bargain over the effects of the decision if there will be measurable changes in work for union employees.
- Employers should not be surprised by an increase in organizing efforts.

Selection Criteria

- Should be consistent with the business reasons for the RIF
- Should make sense from a business perspective
- To the extent practicable, should be uniformly applied
- Decision makers must understand and be able to articulate the selection criteria
- Objective criteria should be used to the extent possible, although employers are generally permitted to use subjective criteria

Objective and Subjective Criteria

- Objective
 - Performance ratings
 - Job functions
 - Seniority
 - Education/certifications
 - Attendance records/disciplinary records
 - Past merit bonuses
 - Any objective measurements of productivity

Objective and Subjective Criteria

- Subjective
 - Performance assessment
 - Performance potential (in current job and others)
 - Leadership
 - Communication skills

Selection Process - Recommended Actions

- Conduct a legal and management review that identifies existing policies or contracts that may affect the selection process or other workforce reduction issues and collects any existing employee selection information.
- Identify unbiased and untainted selectors for the selection process. Selectors who have personality conflicts, a history of improper or discriminatory conduct, or other baggage are an invitation for a lawsuit.

Selection Process - Recommended Actions

- Establish objective criteria for selection, such as prior performance, prior discipline, attendance, and length of service. Employee cost may be a relevant consideration; however, some courts may view this as a proxy for age discrimination, especially if the cost factor has an adverse impact on older workers.
- Develop a plan for communications to employees and to external groups (clients or customers, creditors, and the press) that clearly and consistently articulates the decision, the bases for the decision, and the expected impact of the decision.

Selection Process - Recommended Actions

- Develop a protocol for documentation that maintains confidentiality (especially during the early planning stages) and preserves the record for any potential litigation.
- Train the selectors on legal issues and considerations, how to make objective decisions, and how to obtain and access available and pertinent information.

Selection Process - Recommended Actions

- Have selectors identify jobs that will be eliminated and individuals who will be terminated within each job classification. If employees have any contractual bumping or transfer rights, the potential impact of those rights should be considered.
- Conduct a legal and management review of the selections to determine whether there appears to be any basis for claims of disparate treatment or retaliation and to analyze whether there is an adverse impact on any protected status.

Analyzing a RIF

- Disparate impact analysis:
 - Consider both the 4/5 rule and standard deviation analysis
 - Avoid a one-size fits all approach to disparate impact analysis
 - Analyze and categorize the data at the level where the decisions are actually made (e.g., by business unit, job classification), so that similarly situated employees can be identified and compared
 - Control for the variables that will actually affect the decision-making (e.g., performance evaluations)

Analyzing a RIF

- Review of supporting documentation
- Challenge comparative rankings – require initial decision-makers to state specifically why someone is listed, and their peers are not

Selection Process - Recommended Actions

- Provide individual notices to employees that explain the decision, any internal appeals process, any severance options, any request for a release, and any statutorily required information. The manner in which the news is provided to individual employees may influence whether the employees decide to pursue claims and may influence a judge's or jury's perception of the company.
- Consider allowing employees to bring internal appeals of selection decisions. This may increase employee confidence in the process and may help identify an improper decision that could have otherwise resulted in litigation.

Why is the Selection Process Important?

- Multiple decision-makers can help support lack of bias
- Same actor inference
- Prior acts of “goodwill” by the employer
 - Reasonable accommodations
 - Leave extensions
 - Promotions
- Application to RIF situations

Documentation

- Ensure that documentation supports decisions to:
 - Undertake the RIF
 - Select particular employees
 - Contains no smoking guns (e.g. age distribution of affected employees)
 - Maintain the privileged status of documents

Maintaining Privileged Status Of Pre-RIF Analyses

- Potentially Available Privileges:
 - Work product doctrine
 - Attorney-client privilege
 - Self-critical analysis privilege

Strategies to Maintain the Privileges

- Employer should prepare a written request for legal advice regarding RIF planning and implementation.
- Documents prepared by counsel (particularly any final report or summary) should explicitly refer to that request for legal advice.
- Counsel should set forth in detail all of the potential litigation that is anticipated and why he or she believes such litigation is likely.

Strategies to Maintain the Privilege

- Counsel should coordinate and supervise the process of RIF planning and implementation.
- Statisticians and consultants should be retained by counsel and report directly to counsel.
- The formal retention letter for any statistician or consultant should set forth the elements of the applicable privileges and indicate that the individual's assistance is necessary for the purpose of rendering legal advice to the company.

Strategies to Maintain the Privileges

- Access to discussions, correspondence, and documents should be restricted to only those individuals who need to have information or be involved, and this restricted access should be documented.
- Reports, notes, communications, and other documents (in written and electronic format) should be labeled "privileged and confidential" and "attorney work product."

Strategies to Maintain the Privilege

- To avoid the risk of waiving a privilege, the company should take measures to assure that no privileged material is voluntarily or inadvertently disclosed to a third party.
- In the event of litigation, a statistician or other consultant who had been involved in RIF planning should not be retained as a testifying expert.

WARN Act

- Although many small employers may have latitude about how and when to tell employees that a workforce reduction or shutdown is imminent, the Worker Adjustment Retraining and Notification Act ("WARN Act"), 29 U.S.C. § 2101 *et seq.*, sets specific guidelines for when covered employers must give notice of a mass layoff or shutdown and establishes substantial penalties if the notice requirements are violated. Related regulations are set forth in 20 C.F.R. § 639.

WARN Act

- The WARN Act requires employers to give employees at least 60 days advance notice (or alternatively, 60 days pay in lieu of notice) in the event of a covered "plant closing" or "mass layoff."
- Applies to employers with 100 or more employees (excluding employees who have worked less than 6 months in the last 12 months and not counting employees who work an average of less than 20 hours a week)

WARN Act

- "Plant Closing"—shutdown of an employment site or facility that results in an employment loss for 50 or more employees during any 30-day period.
- "Mass Layoff"—loss of employment during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer's active workforce.
- Additional notice/payment requirement: Job losses within any 90-day period will count toward WARN threshold levels, unless the employer demonstrates that the job losses are the result of separate and distinct actions and causes.

WARN Act

EXCEPTIONS TO 60-DAY NOTICE REQUIREMENT

- **Faltering company:** 60-days advance notice is not required if, prior to a plant closing, an employer is actively seeking capital or business that would allow the employer to avoid a shutdown, provided that the employer reasonably and in good faith believes that advance notice would prevent the employer from obtaining such capital or business.
- **Unforeseen business circumstances exception:** 60 days advance is notice not required in the event of a sudden, dramatic, and unexpected action or condition outside the employer's control that was not reasonably foreseeable. It is the employer's burden to show that the event causing the employment loss was truly unforeseeable to a reasonable employer.
- **Natural disaster:** When a plant closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, drought, storm, tidal wave, or similar effects of nature, notice may be given after the event.

For all of these exceptions, the employer must give as much notice as possible under the circumstances.

WARN Act

Who Must Receive Notice:

- The exclusive collective bargaining representative of affected employees
- Unrepresented individual workers who may reasonably be expected to experience an employment loss
- The State dislocated worker unit
- The chief elected official of the unit of local government in which the employment site is located (e.g., the mayor of the town/city where the layoffs will occur)

State WARN Acts

- A number of states and localities have enacted their own WARN statutes
- Some states' laws do nothing more than track federal requirements. Others may:
 - Extend coverage to employers not covered by WARN
 - Lengthen the notice period
 - Remove exemptions available under federal law
 - Impose additional penalties for non-compliance

WARN Act and related issues

- As soon as an employer recognizes that it is having financial difficulties and may need to reduce its workforce, the employer needs to take the following steps:
- Evaluate whether your company is subject to WARN Act requirements.

WARN Act and Related Issues

- Determine whether you will be engaging in a covered event (either a mass layoff or plant shutdown).
- If you are a covered employer planning a covered event, build the WARN Act and its notice periods into your overall workforce reduction plan.
- Compile a master list of all persons to receive WARN Act notices broken down by category.

WARN Act and related issues

- Prepare all necessary WARN Act notices, including local and union notices.
- Mail notices in a timely fashion. If you are providing less than 60 days notice because of a faltering company or unforeseeable business circumstances exception, mail notices as soon as possible after you discover that the layoff or shutdown is necessary.
- If you are an employer with unionized workers, consider whether to outreach to the Union(s) in addition to providing mandatory notices.

WARN Cases

Gross, et. al. v. Hale-Halsell Co., 554 F.3d 870 (10th Cir. 2009).

- Plaintiffs appealed district court's grant of summary judgment against defendant former employer for alleged violations of the WARN Act. The Tenth Circuit held principal customer's termination of its relationship, while always a possibility, was not reasonably foreseeable, for purposes of WARN's unforeseeable business circumstances exception.

WARN Cases

Plasticsource Workers Committee v. Coburn, 283 Fed.Appx. 181, 2008 WL 313107 (5th Cir. 2008).

- The Fifth Circuit held that an individual may be held liable for statutory damages under the WARN Act through an alter-ego theory. The Court rejected the plaintiff's argument that the use of the term "business enterprise" in the statute precluded the WARN Act's application to natural persons.

WARN Cases

***McMillan v. LTV Steel, Inc.*, 555 F.3d 218 (6th Cir. 2009).**

- Court held, despite fact that Plaintiff was no longer a member of the steel worker's union at the time agreement was reached (having ceased employment with the defendant some time previously), that settlement of WARN Act claims negotiated between the union and defendant barred plaintiff's claims. The union remained plaintiff former employee's authorized representative for purposes of asserting WARN Act claims.

WARN Cases

***In Re: APA Transport Corp. Consolidated Litigation*, 541 F.3d 233 (3rd Cir. 2008).**

- The United States Court of Appeals for the Third Circuit, in a case of first impression, held ERISA funds were not "persons" having standing to sue under the WARN Act. As the statute does not define "person", in reaching this decision, the court relied upon regulations promulgated by the Department of Labor providing that only employees, union representatives, and units of local government may bring suit.

WARN Cases

***Meson v. GATX Technology Services Corp.*, 507 F.3d 803 (4th Cir. 2007):**

- The plaintiff appealed the district court's grant of summary judgment against the defendant former employer alleging, inter alia, violations of the WARN Act. The Fourth U.S. Circuit Court of Appeals held that the plaintiff was not covered by the WARN Act.

WARN Cases

***Long v. Dunlop Sports Group Americas, Inc.*, 506 F.3d 299 (4th Cir. 2007):**

- The Fourth Circuit held that the defendant employer's decision to pay all benefits and wages for 60 days without requiring work accorded with the language and purpose of the WARN Act.

WARN Cases

***Bader v. Northern Line Layers, Inc.*, 503 F.3d 813 (9th Cir. 2007):**

- The employer, a specialty construction company, employed 33 workers at its Billings, Montana, office, with the remaining employees working at construction sites in seven states. The employees were laid off after the parent corporation merged the assets of the employer with another wholly-owned subsidiary. The employer did not provide 60 days advance notice prior to the layoffs.

WARN Cases

***Coppola v. Bear Stearns & Co.*, 499 F.3d 144 (2d Cir. 2007):**

- Employees brought class action against employer's creditor, alleging that creditor closed down employer's principal offices in violation of the WARN Act. The Second Circuit held that the employer's creditor was not liable as an employer under WARN.

WARN Cases

Allen v. Sybase, Inc., 468 F.3d 642 (10th Cir. 2006):

- The employer conducted three separate layoffs, resulting in the separations of 56 workers in a 58-day period between September 7 and October 31, 2001. The district court granted summary judgment in favor of the plaintiffs on their WARN claim. The Tenth U.S. Circuit Court of Appeals affirmed in part and reversed in part.
- The Court held that these 56 layoffs were properly aggregated for purposes of triggering the WARN notice requirements, because the employer could not demonstrate that the job losses were the result of separate and distinct causes.

Compensation Issues

- Compensation issues start with the contractual arrangement between an employer and employee. In addition, the federal FLSA, 29 U.S.C. § 201 *et. seq.*, and the Pennsylvania Wage Payment and Collection Law establish detailed rules about what compensation must be paid, when it must be paid, and what the consequences are of non-payment.
- When employers reduce their workforces, they need to consider the implications of these highly technical statutes. Employees who are not paid all compensation to which they believe they are entitled and employees who are not paid in a timely manner often file individual and class action lawsuits.

Compensation Issues

Potential Claims for Wages, Penalties, and Personal Liability

- When planning a workforce reduction, employers must evaluate what obligations they have to their employees. Such obligations may include:
 - Hourly wages and any required overtime.
 - Salaries (especially for salaried exempt workers).
 - Bonuses.
 - Commissions or spiffs.
 - Pooled tips.

Compensation Issues

- The cash value of vacation or other leave benefits that the employee has a right to cash out.
- Any severance to which the employee is entitled.
- Any other contractual amounts to which the employee is entitled.
- Civil and criminal consequences of not paying payroll taxes or benefit/trust payments.

Compensation Issues

- The failure to pay wages due, or to pay them when due, may constitute a willful non-payment or withholding of wages that can result in a civil cause of action under federal and State law. Such lawsuits can be expensive. The WPCL provides a statutory basis for recovery of attorneys fees in any action where an individual recovers wages. It also provides for liquidated (25%) damages and *individual liability*.

Compensation Issues - Recommended Actions

- When a company in distress is considering workforce reductions or other necessary business decisions, the company should take the following steps:
- Evaluate what financial obligations you have to your employees and determine how you can meet them.
- If you cannot meet these obligations, negotiate with creditors and prioritize cash flow so that these obligations can be met.

Compensation Issues - Recommended Actions

- Adopt corporate directives that expressly state that (1) management may not allow employees to work unless there is money available to pay them, and (2) employees must be paid for all time worked.
- Determine a timeline for the calculation of final wages and distribution of final pay checks.
- Pay all wages when they are due.
- Pay all benefits payments and payroll taxes when due.

Compensation Issues - Recommended Actions

- An employer that is contemplating bankruptcy should consider what impact a bankruptcy filing will have on potential wage claims by employees. Employees who cannot obtain wages in a bankruptcy proceeding may, in addition to or instead, seek a judgment against the officers and managers of the company under the WPCL.

Packages and Benefits

- Severance Benefits
- Health Care Continuation (COBRA)
- Unemployment Compensation
- Outplacement
- Releases and Waivers

- *Review handbooks, collective bargaining agreements, and employment contracts for existing obligations*

Considerations For Obtaining Releases

- Employers may wish to provide severance pay to terminated employees in exchange for their signing a release agreement not to sue their employer.
- Release agreements must be knowing and voluntary.
- Release agreements must provide employees pay and/or benefits to which they would not otherwise be entitled absent a release:
 - Payment in lieu of WARN notice requirements insufficient
 - Severance benefits payable under employer's policy or employment contract are insufficient
 - COBRA continuation coverage also not sufficient (unless employee's share is subsidized by the employer)

Considerations For Obtaining Releases (cont.)

- Should not be signed before the last day of work.
- Release agreements cannot promise non-cooperation or non-participation in government enforcement proceedings (but generally can waive the employee's right to recover money damages arising out of any such proceeding).
- Releases may be ineffective as to claims for workers' compensation, unpaid wages, overtime.
- Releases of claims under the ADEA must conform to the Older Worker Benefit Protection Act.

Releasing Age Discrimination Claims

- **Requirements of Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)**
 - An individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary.
 - . . . a waiver may not be considered knowing and voluntary unless at a minimum:

Releasing Age Discrimination Claims

- (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
- (B) the waiver specifically refers to rights or claims arising under this chapter;
- (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
- (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

Releasing Age Discrimination Claims (continued)

- (E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
- (F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;
- (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

Releasing Age Discrimination Claims

- If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees,
- the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to-
 - (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
 - (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Termination Programs

- What is a group exit incentive program?
- "Usually an 'exit incentive program' is a voluntary program offered to a group or class of employees where such employees are offered consideration in addition to anything of value to which the individuals are already entitled . . . in exchange for their decision to resign voluntarily and sign a waiver. Usually 'other employment termination program' refers to a group or class of employees who were involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver."

29 C.F.R. §1625.22(f)(1)(iii)(A).

Information Requirements For Release Agreements Under The ADEA

- The "class, unit, or group of individuals" covered by an exit incentive or other employment termination program is determined by examining the "decisional unit." 29 CFR § 1625.22(f)(1)(iii)(C).
- A "decisional unit" is "that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver." 29 CFR § 1625.22(f)(3)(i)(B).

OWBPA Cases

- Ollie v. Plano I.S.D.*, 564 F.Supp.2d 658 (E.D. Tex. 2008).**
- Court refused to enforce settlement agreement as to ADEA claim asserted by employee "because [the agreement] lacked language required by 29 U.S.C. § 626(f)(1)(B) and (C)." *Id.* at 660. The parties had previously reached settlement terms at mediation; however, when attempting to finalize the settlement with formal documents, the agreement collapsed. Defendant former employer, thereafter, unsuccessfully moved the Court to enforce the terms of the agreement and to dismiss employee's ADEA claim. *Id.*

OWBPA Cases

Syverson v. IBM, 472 F.3d 1072 (9th Cir. 2007).

- The Ninth Circuit Court of Appeals held that a severance waiver offered by the employer did not satisfy the OWBPA's "knowing and voluntary" requirement. *Id.* at 1074. Ten employees who signed the waivers as part of their severance agreement challenged the "use of both a release covering ADEA claims and a covenant not to sue excepting them," which together caused confusion over whether the employees could still assert ADEA claims. *Id.* at 1074-75.
- The Court found the waiver was confusing to the average employee and thus did not fulfill OWBPA's requirement that "a waiver be part of an agreement between the individual and the employer that is written in a manner calculated to be understood by [the] individual, or by the average individual eligible to participate" in a workforce reduction plan." *Id.* at 1076. The Court noted that the OWBPA requires waivers "drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate" in a RIF. *Id.* at 1077.

OWBPA Cases

Ruehl v. Viacom, Inc., 500 F.3d 375 (3d Cir. 2007).

- Employee's waiver of ADEA claims held invalid under the OWBPA because the employer did not provide the demographic information as required by 29 U.S.C. § 626(f)(1)(H), i.e., the employee units covered by the RIF, the employees eligible or selected for the RIF, and the employees in the same job classification not chosen or eligible for the RIF. 500 F.3d at 380-82; see 29 U.S.C.A. § 626(f)(1)(H). Rejecting the employer's argument that the information was available and that the employer would have supplied the information to the employee had he asked for it, the Court stated that the OWBPA "places the burden on the employer to ensure that waivers are knowing and voluntary." 500 F.3d at 381. Since the package did not supply the required information to the employee and did not contain any suggestion that the information existed and was available to the employee upon request, the waiver was unenforceable because it was not "knowing and voluntary." *Id.*

OWBPA Cases

Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090 (10th Cir. 2006).

- Employer's waiver agreement given to mill employees as part of a RIF held invalid it misidentified the "decisional unit," or class of individuals considered for discharge. *Id.* at 1091. Section 626(f)(1)(H)(i) of the OWBPA requires that the employer attach information regarding its "decisional unit" as one of the requirements to render a waiver "knowing and voluntary." *Id.* at 1093-94. In this case, the employer did attach information about a decisional unit, but it was incorrect information. *Id.* at 1094. The attachment indicated that the entire mill was part of the class considered for termination, when in fact the employees who did not report to the mill manager (over ten percent of the population) were not considered part of the decisional unit. *Id.* Because of the error, the Court held the waiver "invalid and unenforceable with respect to any age discrimination claim." *Id.* at 1095-96.

OWBPA Cases

***Burlison v. McDonald's Corp.*, 455 F.3d 1242 (11th Cir. 2006).**

- Reversing the trial court, the Eleventh Circuit Court of Appeals upheld waiver agreements given by an employer during a nationwide RIF. The waiver given by the employer contained decisional unit demographic information pertaining to the specific region in which the employees worked. Id. at 1244. The district court interpreted the OWBPA to require that the employer provide job titles and ages of all employees nationwide who were terminated, but the ages of only those employees in the same "decisional unit" as the terminated employees. Id. at 1245. After an analysis of the statutory language, the Eleventh Circuit reversed, holding that "the OWBPA's informational requirements are limited to the decisional unit that applies to the discharged employees," and are not supplied on a national scope. Id. at 1247. The waiver was upheld because the employer supplied the employees with appropriate region-specific decisional unit information. Id. at 1249.

OWBPA Cases

***Parsons v. Pioneer Seed Hi-Bred Int'l, Inc.*, 447 F.3d 1102 (8th Cir. 2006).**

- In finding that the employer's waiver fulfilled the OWBPA's statutory requirements, the Eighth Circuit Court of Appeals noted, among other things, that the "party asserting the validity of the waiver bears the burden of establishing that the agreement itself was written in a manner calculated to be understood." Id. at 1105. As to this threshold question, the Court held that the issue was not whether the employee subjectively understood or even voiced confusion about the waiver when making a determination that the waiver was valid. Id. However, the employee's subjective state of mind may be helpful when the Court attempts to determine whether the waiver made was "knowing and voluntary." Id.

ERISA Issues

- ERISA establishes detailed rules regarding qualified pension and benefit plans. When structuring a workforce reduction, employers need to be certain that they do not violate the qualification rules for such plans.
- Retirement Benefits – written and oral representations; reservation of rights clauses in plan documents.

ERISA Section 510

- Section 510 of ERISA, codified at 29 U.S.C. § 1140, provides that “[i]t shall be unlawful for any person to discharge, ... suspend ... or discriminate against a participant ... for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an ERISA] plan.”

ERISA Section 510

- “Congress recognized that it may sometimes be in the employer’s economic self-interest to abort its employees’ accumulation of the requisite age and service prior to vesting. Congress sought to provide safeguards for such abuses and to ensure that “an employer cannot fire anybody with impunity to avoid pension liability.” Hayden v. Freightcar America, Inc., 2008 WL 375762 (W.D. Pa. 2008).

ERISA Section 510

- “Section 510’s essential purpose is to prevent employers from intentionally interfering with impending pension eligibility whether motivated by malice toward the particular employee(s) or by a general concern for the economic stability of the company. Of course . . . incidental loss of pension benefits as the result of a legitimate business practice will not constitute a violation of ERISA. Bad faith, however, is not an element of a section 510 claim.” Hayden, 2008 WL 375762 at *56.

ERISA Section 510

- § 510 of ERISA requires no more than proof that the desire to defeat pension eligibility is **one** determinative factor in the challenged conduct.
- To recover, a plaintiff must demonstrate that the defendant had the “specific intent” to violate § 510. Plaintiff must show that the employer made a conscious decision to interfere with the employee's attainment of pension eligibility or additional benefits. Gavalick v. Continental Can., 812 F.2d 834, 860 (3d Cir. 1987).

ERISA Section 510

- **Mixed-Motive Analysis** -- If plaintiff produces direct evidence to discriminate against those who were about to qualify for pension rights, burden shifts to Employer to produce evidence demonstrating that it would have taken action absent their intent to interfere with pension eligibility.

COBRA Issues

- COBRA provides terminated employees with the right to continue benefits, at their own expense, so long as the benefit plan is maintained by the employer. The Act also requires that employers provide notice of any terminations to plan administrators and that the plan administrators send notices of COBRA rights to employees all within 44 days after their termination.

COBRA Issues

- COBRA SUBSIDY
 - Employers should be working with their brokers to ensure that they have complied with notice obligations to certain employees who were COBRA eligible and were terminated
 - Provides certain premium subsidies to employees who were involuntarily terminated (provided not for gross misconduct)
 - Employers offset taxes or get refund for subsidized portion of premiums

COBRA Issues

- Many states have enacted mini-COBRA laws, including Pennsylvania.

Workers' Compensation Issues

- Employer is entitled to take an offset against claimant's workers' compensation benefits in the amount of severance payment made by employer to claimant. 77 Pa. Stat. § 71(a).

Unemployment Compensation

- Willful misconduct – “an act of wanton or willful disregard of the employer’s interests, (2) a deliberate violation of the employer’s rules, (3) a disregard of standards of behavior which the employer has a right to expect of an employee, or (4) negligence indicating an intentional disregard of the employer’s interests or of the employee’s duties and obligations to the employer.” *McClellan v. UCBR*, 383 A.2d 533 (1978).

Unemployment Compensation

- Willful Misconduct
 - Employer has the burden of proof
 - Employer must prove that the conduct in question was the proximate cause of the claimant’s discharge.

Unemployment Compensation

- Voluntary Quit – “compelling and necessitous reasons”
 - Substantial unilateral changes in employment
 - Reductions in pay
 - Termination of health insurance benefits
 - Transfers to less skilled work
 - Distant relocation of employer’s place of business

Unemployment Compensation

- Employee may collect benefits if resignation is in lieu of termination.
- Employee may collect unemployment benefits while being paid severance.
- “Follow the Spouse” Rule – an employee who quits job may collect benefits to follow involuntarily transferred spouse.

Wage and Hour Issues

- After employment separation, employer must pay all monies owed by next scheduled pay period
- Under the Pa. Wage and Payment Collection Law, “wages” includes fringe benefits or wage supplements. 43 P.S. § 260.2a.
- “Wages” include bonuses under employment contracts, unused vacation, stock options, and unpaid commissions.

Wage and Hour Issues

- Employee may file claim with Secretary of Labor and Industry or civil claim in court.
- Employee may recover wages owed, liquidated damages equal to 25% or \$500 whichever is greater, and attorneys’ fees.
- Secretary of Labor and Industry may also institute criminal proceedings. Officers of corporations may be held personally liable.

Communications to Affected Employees

- The primary purpose is to inform the employee that he or she has been affected by the RIF
- Avoid ambiguity about the employee's status
- At all times treat employee with dignity and respect
- Avoid discussions about the business reasons for the RIF, or how the criteria applied to the affected employee
- Prepare talking points for the manager who will be notifying the affected employee
- Have a third person in the room during the meeting (HR or other manager)

Communications to Affected Employees (cont.)

- Prepare an information packet for the employee, including:
 - the proposed release agreement, if applicable
 - any applicable severance plans or policies
 - COBRA and other benefits information
 - information regarding outplacement assistance
 - Employee Assistance Programs

Rehiring

- Hiring back laid off employees
- Source of liability separate from
- Eligibility for rehire
- Interviews
- Hiring criteria

Selected Recent Legislative Changes

- Americans with Disabilities Amendments Act of 2008
- Family and Medical Leave Act Amendments
- Genetic Information Nondiscrimination Act of 2008

Americans with Disabilities Amendments Act of 2008

- The Americans with Disabilities Amendments Act of 2008 (the "ADAAA") became effective on January 1, 2009.
 - "The Act makes important changes to the definition of the term 'disability' by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA."
- EEOC Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008 ("ADAAA Notice").

Americans with Disabilities Amendments Act of 2008

The Act emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis. *Id.*

Americans with Disabilities Amendments Act of 2008

- Given the relative “ease” with which an individual may be able to establish a “disability” that is covered by the ADAAA, there will likely be more focus on the provision of reasonable accommodations.

Family and Medical Leave Act ("FMLA")

- On October 29, 2009, Congress extended the military family leave provisions of the Family and Medical Leave Act ("FMLA") to a more broadly defined category of military family members.
- Two forms of military-related FMLA leave are available-- exigency leave and military caregiver leave.
 - Exigency leave was originally limited to families of National Guard or Reserves members. It is now available to families of all active duty servicemembers.

Family and Medical Leave Act ("FMLA")

- Military caregiver leave was originally limited to families of current servicemembers. It is now available to families of wounded veterans as well. These changes are effective immediately, although the Department of Labor is expected to issue regulations providing further guidance.

Family and Medical Leave Act ("FMLA")

- While the recently enacted law increases the number of potentially affected employees, it remains the case that the family member taking this form (or any form) of FMLA leave must work for an FMLA-covered employer and must be an "eligible employee," meaning that the employee has worked for the employer for at least 12 months, has worked at least 1,250 hours in the 12-month period preceding the leave, and works at a worksite with at least 50 employees within 75 miles of the site.

Genetic Information Nondiscrimination Act of 2008

- The employment provisions of the Genetic Information Nondiscrimination Act of 2008 ("GINA") became effective on November 21, 2009.
- Title I of GINA prohibits genetic information discrimination with regard to health insurance, and became effective last May.
- Recently, the Internal Revenue Service, Department of Labor and Department of Health and Human Services issued joint interim final regulations that will, among other things, impact an employer's use of health risk and assessments by prohibiting an employer from asking about an employee's family medical history, unless an exception applies, and expand the definition of protected health information to include genetic information.

Federal "Defense of Marriage Act"

- Same-sex marriage is prohibited under federal law for all federal law purposes.
- The Federal Defense of Marriage Act defines the terms "marriage" and "spouse" as follows: "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7.

Another Bill to Watch: the proposed federal Employment Non-Discrimination Act

- The Federal Employment Non-Discrimination Act, **S. 1584/H.R. 3017** ("ENDA") is presently moving through Congress. If enacted in its current form, for employers with fifteen or more employees, ENDA would prohibit employment discrimination based on sexual orientation and gender identity.
