



ATTORNEYS AT LAW

# HOW TO IMPLEMENT AN EFFECTIVE REDUCTION IN FORCE

**MAY 13, 2020**



ATTORNEYS AT LAW



Sara G. McGrane  
(612) 373-8511  
smcgrane@felhaber.com



Penelope J. Phillips  
(612) 373-8428  
pphillips@felhaber.com

# WHAT IS A REDUCTION IN FORCE?

- When an employer lets employees go to due to insufficient work for the foreseeable future.
- Permanent – the employees involved in the RIF will not return to work

# WHAT IS A “GOOD” REDUCTION IN FORCE?

- Valid business justification
- Advanced planning and process
- Clear documentation and communication
- Valid releases and severance

# WHAT IS A “BAD” REDUCTION IN FORCE?

- Using an RIF to get rid of under-performing employees
- Providing cover for retaliation, discrimination, or other unlawful motives.
- Not having any methodology at all



# CONSIDER ALTERNATIVES

- Attrition
- Hiring freeze
- Reducing or limiting overtime
- Reducing non-employee related expenses
- Temporary layoffs
- Reassignment
- Job Efficiencies
- Employee sharing between departments/business units

# STEP 1: DEVELOPING A VALID BUSINESS JUSTIFICATION

- Why is a RIF needed?
  - Decrease in volume of work
  - Elimination of job functions
  - Office closing/consolidations
  - Increased expenses
  - Temporary or long-term issue?

# STEP 1: DEVELOPING A VALID BUSINESS JUSTIFICATION

- RIF considerations:
  - What is the specific goal of the RIF?
  - How much money will be saved?
  - How will the RIF improve or stabilize the business?
  - Is the RIF part of other short-term or long-term business changes?





# STEP 1: DEVELOPING A VALID BUSINESS JUSTIFICATION

- Draft written documentation that identifies:
  - Business changes that make the RIF necessary
  - Financial data supporting the RIF
  - All decision makers
  - Workforce and tasks before and after the RIF
  - Expected cost savings and efficiencies
  - Number of employees impacted
  - Selection criteria
  - Timing of communications to employees
  - Schedule of terminations



## STEP 2: IDENTIFYING THE DECISIONAL UNIT

- Where will the reductions come from?
  - 10% of all personnel costs across the board reduced vs. reducing one department
  - Focus on job functions, not specific individuals

# STEP 3: DETERMINING SELECTION CRITERIA

- Determining the selection criteria for the RIF
  - Criteria should be:
    - Job-related;
    - Neutral; and
    - Applied consistently

# STEP 3: DETERMINING SELECTION CRITERIA

- This step is ripe for legal challenge
- Keep criteria objective to avoid discrimination claims
  - Age
  - Gender
  - Race
- Also avoid decisions that raise the inference of retaliation
  - Workers comp
  - Whistleblower
  - Leave status

# STEP 3: DETERMINING SELECTION CRITERIA

- Selection Criteria:
  - Objective: Seniority, licensures, certifications, educational qualifications, attendance records; productivity; performance.
  - Subjective: Teamwork; communication skills; leadership; judgment.
- When applying subjective factors, emphasize objective criteria for establishing who are the better performers.
  - Example: Evaluating performance based on prior warnings and disciplinary actions.

# STEP 3: DETERMINING SELECTION CRITERIA

- Other objective selection criteria:
  - Job Criticality: What jobs are the most crucial to the business's continued operations?
  - Training considerations: Who has the necessary training to assume additional duties?

# STEP 3: DETERMINING SELECTION CRITERIA

- Be sure to discuss criteria with department leaders to ensure selection criteria takes into account what is most needed and most important.

# STEP 4: APPLYING THE SELECTION CRITERIA

- Ranking or scoring employees based determined selection criteria
- Can use a single ranking or multi-tier/step approach
  - Taking single or multiple factors into account
  - Not all factors need to be scored the same
    - E.g., training scored out of 20 points while attendance scored out of 10 points.



# STEP 4: APPLYING THE SELECTION CRITERIA

- Be sure that those participating in the selection process understand the criteria and method of assessment as well as the overall goals of the RIF.
- Consider having more than one evaluator involved to avoid individual supervisor biases.
- Consider additional safeguards:
  - Review by upper management
  - Allow evaluated employees opportunity to comment

# STEP 5: ADVERSE IMPACT ANALYSIS

- Using statistical analysis to analyze selection criteria and application to determine if they impact protected groups more than non-protected groups relative to the group of employees as a whole.
- Gives employers an opportunity to adjust selection criteria to avoid adverse impact.
- Ensures that the employer can defend its RIF decisions in the face of a legal challenge.

## STEP 5: ADVERSE IMPACT ANALYSIS

- Completed only when 5 or more employees are being eliminated from one “peer” group or where there are 5 or more single incumbents being eliminated.
- Comparing the employer’s workforce overall with those employees selected for release.
- “Roll-up” analysis may be needed to evaluate overall impact in an entire affected department.

# STEP 5: ADVERSE IMPACT ANALYSIS

- Evaluate the results to determine if there is a **disparate impact** on a protected groups:
  - Minorities as a group
  - Age (40 or over)
  - Sex
  - Ethnicity
  - National origin
  - Disability

## ADVERSE IMPACT ANALYSIS

DIVISION/UNIT:  
LOCATION:  
POSITION:  
EXEMPT/NON-EXEMPT:

ENTER TOTAL NUMBER OF EMPLOYEES IN DIVISION/UNIT:

ENTER TOTAL NUMBER OF EMPLOYEES TO BE TERMINATED:

	TOTAL < 40	TOTAL 40 +	40-49	50-59	60 +	TOTAL NONMIN	TOTAL MINOR	HISPA	BLACK	ASIAN	Nat Hawaiian	Two Races	AM IND	MEN	WOMEN
Total # of Employees in Protected Class	0	0	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	0	0	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	0	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>
Ratio Expectancy	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
# of Employees Terminated in Protected Class	0	0	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	0	0	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>	0	<input style="width: 40px; height: 20px; background-color: yellow;" type="text"/>
Standard Deviation		N/A	N/A	N/A	N/A		N/A	N/A	N/A	N/A	N/A	N/A	N/A		N/A
80% Rule Analysis		N/A	N/A	N/A	N/A		N/A	N/A	N/A	N/A	N/A	N/A	N/A		N/A
Further Review Required?		N/A	N/A	N/A	N/A		N/A	N/A	N/A	N/A	N/A	N/A	N/A		N/A

ATTORNEY CLIENT PRIVILEGED AND CONFIDENTIAL  
ATTORNEY WORK PRODUCT - PREPARED AT THE REQUEST OF COUNSEL

## ADVERSE IMPACT ANALYSIS

DIVISION/UNIT: Company Wide  
 LOCATION:  
 POSITION:  
 EXEMPT/NON-EXEMPT:

ENTER TOTAL NUMBER OF EMPLOYEES IN DIVISION/UNIT:

1626

ENTER TOTAL NUMBER OF EMPLOYEES TO BE TERMINATED:

52

	TOTAL < 40	TOTAL 40 +	40-49	50-59	60 +	TOTAL NONMIN	TOTAL MINOR	HISPA	BLACK	ASIAN	Nat Hawaiian	Two Races	AM IND	MEN	WOMEN
Total # of Employees in Protected Class	1232	394	194	140	60	1539	87	14	17	43	0	12	1	936	690
Ratio Expectancy	39.40	12.60	6.20	4.48	1.92	49.22	2.78	0.45	0.54	1.38	N/A	0.38	0.03	29.93	22.07
# of Employees Terminated in Protected Class	18	34	14	12	8	42	10	3	3	3	0	1	0	8	44
Standard Deviation		7.04	5.03	4.32	4.55		4.52	3.89	3.40	1.43	N/A	1.01	N/A		6.25
80% Rule Analysis		16.93%	20.25%	26.18%	21.07%		23.74%	14.19%	17.26%	44.37%	N/A	37.92%	N/A		13.40%
Further Review Required?		REVIEW	REVIEW	REVIEW	REVIEW		REVIEW	REVIEW	REVIEW	REVIEW	N/A	REVIEW	N/A		REVIEW

Phase 1 - 6/1/2020

ATTORNEY CLIENT PRIVILEGED AND CONFIDENTIAL  
 ATTORNEY WORK PRODUCT - PREPARED AT THE REQUEST OF COUNSEL



# STEP 5: ADVERSE IMPACT ANALYSIS

- The Four Fifths Rule:
  - EEOC regulations: “a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or 80%) of the rate for the group with the highest rate will generally be regarded by the federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by federal enforcement agencies as evidence of adverse impact \*  
\* \* ”  
.
  - This means that if an employer implements a RIF and the release rate for the non-protected group of employee is at least 80% of the release rate for the protected group (individuals over 50, for example), adverse impact will generally not be found.

## STEP 5: ADVERSE IMPACT ANALYSIS

- What if the analysis does show a disparate impact on a protected group?
- Talk to managers and other decision-makers about results
- Consider adjusting criteria
- Prioritize the objective over the subjective
- Reevaluate ranking system





# STEP 5: ADVERSE IMPACT ANALYSIS

- What if the analysis does show a disparate impact on a protected group?
  - EEOC example:
    - Budget constraints require Employer to layoff most recently hired employees.
    - After initial RIF selection, female employees account for 85% of the layoffs, but are only 30% of the total workforce.



# STEP 5: ADVERSE IMPACT ANALYSIS

- EEOC example (continued):
  - Adjust selection criteria to include additional factors, such as profitability, productivity, and expertise
  - Re-run selection criteria and adverse impact analysis
  - New criteria results in Employer's desired financial outcome but lays off fewer female employees.



# STEP 6: ORGANIZE THE RIF DOCUMENTATION

- Business justification statement
- List of employees in the decisional unit
- Key employee data
  - Titles, dates of hire, compensation
  - Employee data related to selection criteria
  - Protected class information
- Adverse impact analysis

# STEP 7: DRAFT SEPARATION AGREEMENTS

- Full release of all claims
- Severance
- Benefits
- Other terms



# STEP 7: DRAFT SEPARATION AGREEMENTS

- Release of Claims
  - At least two individuals over 40 in the group to be released?
  - Releases must comply with the Older Worker Benefit Protection Act (“OWBPA”).



# STEP 7: DRAFT SEPARATION AGREEMENTS

- OWBPA release requirements:
  - Release must be in writing, and be written in an understandable manner;
  - Not mislead, misinform, or otherwise exaggerate benefits to be received in exchange for signing;
  - Must provide each employee 45 days to consider whether or not to sign the release;

# STEP 7: DRAFT SEPARATION AGREEMENTS

- OWBPA release requirements (continued):
  - Must specifically refer to the ADEA;
  - Must specifically advise the employee to consult with an attorney before signing the agreement;
  - Cannot require the employee to waive rights or claims arising after the date the release is signed.

# STEP 7: DRAFT SEPARATION AGREEMENTS

- OWBPA release requirements (continued):
  - Must provide employees with the job titles and ages of employees who are being terminated as part of the RIF and as well as those for employees who are not being terminated, (“Exhibit A”).
- Phased RIF programs will require updates to this information as additional employees are let go.



# STEP 7: DRAFT SEPARATION AGREEMENTS

- Release of Claims
  - Full release of all claims, state and federal
  - Under the Minnesota Human Rights Act (“MHRA”) all employees have 15 days after signing the release to revoke it.
  - ADEA: 21/45 days to consider and 7 days to rescind if outside Minnesota.



# STEP 7: DRAFT SEPARATION AGREEMENTS

- Severance
- Benefits
  - The Consolidated Omnibus Reconciliation Act of 1985 (“COBRA”): Employers have an obligation to offer continuing health insurance for 18 months to terminated employees or those who have suffered a reduction in hours that has caused a loss of benefits.
  - Life insurance
  - Any other benefits (payout of PTO/vacation)



# STEP 7: DRAFT SEPARATION AGREEMENTS

- Other terms:
  - Return of property
  - Confidentiality
  - Non-disparagement
  - References

# STEP 7: DEVISE A COMMUNICATION STRATEGY

- Timing
- Role of managers and supervisors
- Prepare talking points



# STEP 8: NOTIFY EMPLOYEES

- For affected employees:
  - In person, one on one discussion
  - Provide documentation:
    - Criteria and selection
    - Separation agreement
    - COBRA and other benefits
    - FAQ
    - Final paycheck
- Be prepared to explain business rationale, selection process, pay & benefits, unemployment process, other employee resources.



## STEP 8: NOTIFY EMPLOYEES

- For other employees:
  - Be prepared to explain: Business rationale, selection process, impact on business/unit/department structure; timeline; other relevant changes.
  - Clear, consistent communication will reduce confusion and anxiety for remaining employees.

## STEP 9: PLAN FOR POST-RIF ISSUES

- Determine uniform response for requests for references and personnel files
- Evaluate future new hires, transfers, and recalls for consistency with RIF business justification and communications.

# ADDITIONAL CONSIDERATIONS: INTERNAL POLICIES

- Evaluate any existing employment agreements
- Review internal policies and ensure that RIF complies with them or amend them prior to instituting RIF
- Unionized employers:
  - Review any applicable contract provisions
  - Effects bargaining



# ADDITIONAL CONSIDERATIONS: DISCRIMINATION CLAIMS

- Discrimination, retaliation, unlawful termination claims

Statute	Protected Class
Minnesota Human Rights Act	Race, color, creed, religion, national origin, sex, marital status, familial status, disability, sexual orientation, and age
Title VII	Race, color, religion, sex, and national origin
ADEA	Age
ADA	Disability
Minnesota Whistleblower Law	



# ADDITIONAL CONSIDERATIONS: DISCRIMINATION CLAIMS

- Plaintiffs need to establish pretext to prove discrimination claims
- Types of evidence plaintiffs use in RIFs:
  - Business case not supported by evidence
  - Statistical evidence
  - Failure to follow internal policies related to RIFs, terminations, severance, etc.
  - Inconsistencies implementing and communicating RIF
  - Discriminatory/retaliatory comments

# ADDITIONAL CONSIDERATIONS: THE WARN ACT

- Federal law, but Minnesota and many other states have their own “mini-WARN” Acts
- Covered employers must provide **60 days** advance written notice of planned plant closing or mass lay off
- “Covered employers”: business enterprise with 100 or more employees

# ADDITIONAL CONSIDERATIONS: THE WARN ACT

- **Plant closing** is defined as:
  - Permanent or temporary shutdown of a single site of employment or facility/operating unit
  - 50 or more employees experience an employment loss.



# ADDITIONAL CONSIDERATIONS: THE WARN ACT

- **Mass layoff** defined as:
  - Not a plant closing
  - 500 or more employees at a single site of employment are affected or
  - Between 50 and 499 employees are affected which account for at least 33% of active employees at the employment site.



# ADDITIONAL CONSIDERATIONS: THE WARN ACT

- **Employment loss** is defined as:
  - Terminations (excluding terminations for cause, voluntary resignations and retirements)
  - Layoffs exceeding 6 months
  - A reduction in hours of work of individual employees of more than 50% during each month for 6 months.

# ADDITIONAL CONSIDERATIONS: THE WARN ACT

Who must receive notice?

- Unionized workplace: Representatives of affected employees (chief elected union official and local union official)
- No union: each affected employee
- The state dislocated worker union (MN DEED)
- Chief elected official of the unit of local government within which the mass closing or layoff is to occur.



# ADDITIONAL CONSIDERATIONS: THE WARN ACT

Exceptions to the 60-day requirement:

- Faltering company
  - Company must be actively seeking business or capital at the time 60-day notice would be required and providing notice would impact ability to obtain it
- Unforeseeable business circumstances
  - Closing or layoff caused by business circumstances not reasonably foreseeable at the time the notice would have been required
  - Sudden, dramatic condition outside of the company's control



# ADDITIONAL CONSIDERATIONS: THE WARN ACT

Exceptions to the 60-day requirement (continued):

- Natural disaster
  - Flood, earthquake, drought, storm, etc.

In these circumstances, notice must be provided as soon as practicable and must explain why advance notice was not possible.



# QUESTIONS?

## Thank you.