

Reductions In Force: Considerations, Checklists and Best Practices for RIFs in the Financial Services Industry

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Overview

- Checklist/issue spotting
- OWBPA requirements
- Adverse impact analysis and rationale review
- WARN issues
- ERISA issues
- Voluntary programs
- Typical documents
- Agreement / release “best practices”

The Financial Services Industry: Recent Examples

- According to a recent Bloomberg news report, “In 2018, the twelve largest global investment banks cut front-office headcount for at least the fifth straight year...”
- Consistent with this and other media coverage in the space, RIFs continue to affect the financial services industry in 2019

The Financial Services Industry: Recent Examples (cont'd)

- Media coverage specifies that financial services employers offer various benefits to employees in connection with RIFs
- Recent reports show employers offering:
 - 60 days pre-notice
 - 60 days formal notice
 - Severance packages
 - Outplacement services

Financial Services: RIF Rationales

- Automation and other technological development
- Cost reduction/meeting projection goals
- Investor preferences
- Geopolitics (i.e. Brexit)
- Internal employee redistribution
- Making way for new talent
- Discipline – failure to meet production targets

RIF Checklist and Issue Spotting

- Initial planning: purpose and scope of program
- Determine/advise on selection process and criteria
- What benefits will be offered?
 - Assess pre-existing plans, policies, agreements

Getting Started: What You Need to Know

- How many employees are being separated?
 - Is it a group termination under the ADEA/OWBPA?
 - Need to obtain demographic data of employees in “decisional unit”
 - Need to determine location of selected employees
 - Need to assess WARN implications – recent terminations at any affected sites
- Are employees 40 years of age or older?
 - Requirements of ADEA/OWBPA (29 U.S.C. 626(f))
 - Treatment of under-40 employees is context-driven

Getting Started: What You Need to Know (cont'd)

- Is there a standing severance policy/practice/handbook?
- Is there an applicable severance plan?
- Do any employees have an individual employment contract or offer letter?
 - Severance provision?
 - Notice provision?
 - Other provisions to incorporate/survive termination?

Getting Started: What You Need to Know (cont'd)

- What consideration is being offered, and what is already owed to employees?
 - Agreement must be clear about what is subject to release and that to which employee is already entitled
- Are there any special concerns about any employees or the circumstances?
 - Contentious vs. amicable separations
 - Simple vs. complex agreements
 - “Sensitive” issues (e.g., employee on leave, employee who has made complaints, etc.)

What is a Group Termination “Program”?

- 29 C.F.R. § 1625.22 (F)(1)(iii)(B)
- A “program” exists when an employer offers additional consideration for the signing of a waiver pursuant to an employment termination (e.g., a reduction in force) to two or more employees.
- 29 C.F.R. § 1625.22 (F)(3)(i)(B)
- A group termination program involves a selection process that will include, as well as exclude, employees within a “decisional unit” from the “program.”

NOTE: A “program” must meet the requirements of the OWBPA only if one or more employee is age 40 or older

What is a Decisional Unit?

- A “decisional unit” is that portion of the employer's organizational structure from which the employer selected the impacted employees for the employment termination “program.”
- When identifying the scope of the “class, unit, or group,” and “job classification or organizational unit,” an employer should consider its organizational structure and decision-making process.
 - Need to understand the underlying business decision for this action
- Identifying the population of the decisional unit is on a case-by-case basis.



Decisional Unit Examples:

- *Facility-wide*: Ten percent of the employees in the Springfield facility;
- *Division-wide*: Fifteen of the employees in the Computer Division;
- *Department-wide*: One-half of the workers in the Key Department of the Computer Division;
- *Reporting*: Ten percent of the employees who report to the Vice President for Sales, wherever the employees are located;
- *Job Category*: Ten percent of all accountants, wherever the employees are located, will be terminated next week.

Group Terminations: Rationale Review and Adverse Impact Analysis

- Rationale review
 - Must first understand purpose and scope of program
 - Best practice for decision makers to document reasons for selection criteria and selections made thereunder
 - EEOC publication of recent changes to “Reasonable Factors Other Than Age” rule highlighted importance of contemporaneous documentation and guidance to decision makers
 - Review selection criteria and selections for legitimacy and consistency
- Adverse impact analysis
 - Gather demographic data
 - Statistical analysis of relevant decisional units and other subgroups
 - Advise on potential modifications and/or risks of selections

RIF Checklist and Issue Spotting (cont'd)

- Evaluate WARN issues and plan for compliance
- Develop communications plan and train managers
- Special considerations (e.g., employees on leave)
- Timing of terminations relative to program announcement and relationship to severance documentation, WARN compliance
- Preparation of documentation – whether to “ERISA-fy”
- Outplacement services

WARN Act Compliance



- Requires advance notice to employees and various government officials in the event of a plant closing or mass layoff affecting requisite number of employees
- Federal and state requirements differ with respect to employer coverage, affected employee thresholds, required notice, and other aspects
- Some limited “exceptions” that allow for untimely notice, such as the “unforeseeable business circumstances” and “faltering company” provisions
- Early issue spotting and evaluation are key

Summary Comparison of New York, California and Federal WARN Acts

	NY WARN	California WARN	Federal WARN
Applicable Employers	50 or more employees	75 or more employees at a "covered establishment"	100 or more employees
Notice	90 days written	60 days written	60 days written
Minimum Affected Employees	<ul style="list-style-type: none"> • 25 over 30/90 day period (AND at least 33% of workforce for mass layoff or <i>relocation</i>) OR • 250 	50 over 30 day period	<ul style="list-style-type: none"> • 50 over 30/90 day period (AND at least 33% of workforce for mass layoff) OR • 500
Action Rights	<ul style="list-style-type: none"> ▪ Administrative Enforcement ▪ Private Right of Action 	<ul style="list-style-type: none"> ▪ Administrative Enforcement ▪ Private Right of Action 	Private Right of Action Only

Penalties for Violating Federal WARN Act

- Violating employers are liable to each aggrieved employee who suffered an employment loss for:
 - Back pay at the average regular rate of pay received by the employee during the last three years of employment, or the employee's final rate of compensation, whichever is higher; and
 - Benefits under an employee benefits plan – including medical expenses during the employment loss that would have otherwise been covered
- Liability is capped at a maximum of 60 days
- An employer who fails to properly notify local government officials is subject to a civil penalty of not more than \$500 for each day of such violation
- Similar penalties exist for employers under the NY WARN Act

Common Situation

Question: Handbook has a half-page severance policy that says company pays severance in the amount of 2 weeks per year of service, in the event of involuntary termination for certain reasons. Is that enough, or does the company need something more?

Short answer: Many severance pay plans, whether written or unwritten, will be subject to ERISA. While some aren't, a company could benefit from having a plan designed to comply with ERISA.

ERISA Basics

When is a program an ERISA plan?

- A severance pay arrangement is covered by ERISA only if it constitutes a “plan, fund, or program . . . established or maintained by an employer”
- *Fort Halifax* cases
 - No ongoing administrative program: *e.g.*, provides an easily calculated one-time lump sum payment following a plant closing
 - Indeterminate level of benefits and class of beneficiaries: *e.g.*, payments are entirely discretionary, ad hoc and unsystematic

Factors Used

- Written plan: Written plan operated in compliance with ERISA is usually strong evidence of ERISA coverage, BUT can be an ERISA plan even if it is neither publicized nor formally documented
- Circuits differ but the factors they use have common themes
 - 2d Cir. looks for managerial discretion in administration, whether a reasonable employee would perceive an ongoing commitment, and whether the employer must analyze the circumstances of a termination separately

ERISA Is a Pain

- Procedural and substantive requirements will include:
 - Need for a formal plan document
 - Form 5500 requirement (annual report if at least 100 participants)
 - **Reporting and disclosure requirements**
 - SPDs (we structure to be the same as the formal plan document) and SMM
 - Prudence/exclusive purpose requirements in administration
 - **Less flexibility to ignore terms**
 - Claims and appeal requirements

ERISA Isn't So Bad After All

- Preemption: federal jurisdiction; no state claims (wage, reverse discrimination), jury trials or punitives
- **Discretionary standard of review**: only if in the plan document
- Written plan document encourages consistency and clarifies criteria, **exclusions** and formulas (claims of oral promises, patterns of past behavior, etc. harder to make)
- Claims and appeals procedure is a pre-litigation burden
- EEO relief for bona fide benefit plans
- Contractual statute of limitations

Takeaways

- At the end of the day, most regular ongoing programs will be close enough to ERISA-covered that it may make sense to have an ERISAfied plan document
- But decision may also rest on company philosophy and how disciplined it will be in administration
 - If we have an ERISA plan. . .
 - how often can we make exceptions?
 - does everyone need to know what is paid at various levels?

Voluntary Programs: Practical Considerations

- Consider voluntary resignation incentive programs as a means of avoiding or reducing need for layoffs
- Need to discuss timing and communications vis-à-vis potential involuntary program
- Early discussion of needs and scope of program can mitigate placing “voluntary” nature of program in jeopardy
 - Advise concerning eligibility requirements for participation
 - Employers can reserve discretion to accept/reject participants, but must understand risks

Voluntary Programs: Practical Considerations (cont'd)

- Age-related considerations
 - Use of age plus service as eligibility criterion
 - Interplay with preexisting retirement programs
- Benefits must provide appropriate incentive

Typical Documents We Draft (or Review)

- ERISA Severance Plan (sometimes severance policy or guidelines)
- Separation Agreement and General Release
- Cover Letter or Memorandum
- OWBPA Disclosure Statement
- For voluntary program – election form and acceptance/rejection notices
- Communications pieces
 - For executives, managers, and/or human resources personnel
 - May also advise on corporate communications outside company
 - For group/individual meetings with selected employees and remaining employees
 - May take form of scripts, talking points, or frequently asked questions (FAQs)

Drafting the Agreement

- Release of claims must be supported by additional consideration
- Specific references to statutes released (including state laws)
- Cannot release “future” claims or certain substantive claims (e.g., workers’ comp.)
- Need explicit carve-outs to allow for participation in agency proceedings (e.g., confidentiality, non-disparagement provisions)

Drafting the Agreement (cont'd)

- Tailor other obligations based on circumstances, prior practice, existing agreements, and goals, e.g.:
 - Confidentiality of agreement
 - Non-disparagement
 - Confidential information
 - SEC enforcement language
 - OSHA has also issued policy guidelines regarding approval of settlement agreements in whistleblower cases
 - Trade Secret language pursuant to Defend Trade Secrets Act
 - Cooperation
 - Return of property

Drafting the Agreement (cont'd)

- Releases must be “knowing and voluntary” -- for employees age 40+, ADEA/OWBPA set forth specific requirements:
 - At least 45 days from date of receipt for consideration period
 - 7-day revocation period
 - Cannot include covenant not to sue under ADEA
 - Cannot include “tender back” of consideration prior to filing ADEA suit
 - Advise to consult with attorney, in writing
 - Must include OWBPA disclosure statement
 - Sets forth eligibility requirements and time limitations for participating in group termination program
 - Identifies all employees in decisional unit (job titles and ages) and whether each was “selected” or “not selected” for participation in the program
 - Differences for involuntary and voluntary programs

Drafting the Agreement (cont'd)

- Decide whether to use different forms for over/under age 40
- Agreement should acknowledge receipt of OWBPA disclosure statement (if applicable) and any other explanatory severance documentation (e.g., severance plan)
- State law requirements
 - California – specific waiver language (Civil Code § 1542)
 - New Jersey – 21- day consideration period for all, regardless of age
 - Specific references to statutes recommended and in some cases required

RIF Checklist and Issue Spotting

- Security and communications
 - Return of property
 - Managing employee exits
 - Scripts and FAQs
 - Safeguarding confidential information and employer property
- Final wage payments, including vacation and other accrued benefits
- State law requirements with respect to terminations