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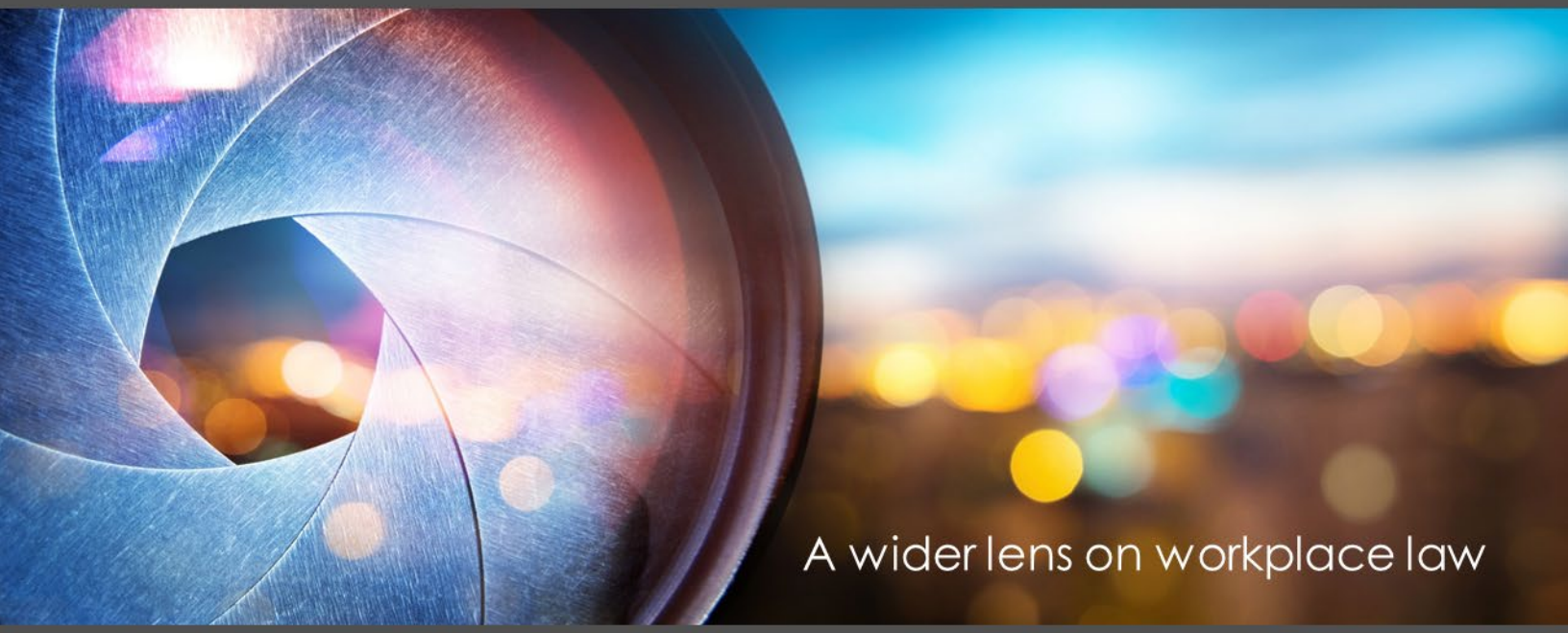

Reduction in Force Toolkit

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Foreword

This Toolkit is intended to assist you in preparing for a reduction in force in your organization and is not intended to be and should not be considered as legal advice.

Labor and employment law issues are very individualized and are highly dependent upon factual details that are unique in almost every instance. The materials in this Toolkit are samples based on laws that are subject to change and upon cases that are subject to appeal and/or inconsistent results due to minute variations in facts or in the presentation of evidence during a trial or hearing. A legal and proper employment decision made in one circumstance might be illegal and create substantial liability due to apparently minor factual differences in another circumstance. Before any decisions regarding a reduction in force are made, please consult with an attorney experienced in labor and employment law.

The materials in this Toolkit are intended to provide general information relating to reductions in force. As a result of recent events involving COVID-19, there may be federal, state or local legislation or regulations that affect reduction in force planning and implementation.

1. Preparing Your Workplace for the Coming Economic Downturn

I. Introduction

After enjoying the longest peace time economic boom in the history of the nation, the country is now facing unprecedented economic concerns. As companies plan to address the potential long-term consequences of the COVID-19 pandemic, mass reductions in force (RIFs) may become commonplace in order to maintain the strength of their businesses and meet budget constrictions.

Reductions in force frequently spawn employment litigation. Therefore, careful planning of a reduction in force is needed to prevent litigation or at least make the decisions made during the reduction in force more defendable.

If a RIF is challenged in court, employers will face questions concerning the layoff, including:

- Who decided that the layoff was necessary?
- What economic circumstances required the RIF?
- Did the employer attempt to reduce its workforce with a voluntary exit incentive program before laying off workers?
- Did the layoff selection process focus on positions or personnel?
- Who is responsible for deciding which employees would be laid off?
- What criteria were used by managers in selecting the persons who would be laid off?
- Were those selection criteria related to the employer's business justification for the RIF?
- What role did previous performance evaluations play in the selection process?
- Were the layoff decisions consistent with the established criteria, and can the employer prove it?
- Did the employer determine whether the layoff adversely affect any protected categories of employees?
- What severance pay or outplacement was provided to employees, and what limitations were there on the right to receive severance pay or outplacement?

II. Planning a Reduction in Force

A. Create a Document "The Layoff Plan"

There are two broad avenues of challenge to a reduction in force: (1) the employer discriminated against an employee in selecting that employee for layoff; and (2) there was in fact no need for downsizing, and the reduction in force was simply an opportunity to weed out employees in a protected classification.

In order to deal effectively with the second of these areas of challenge, an employer planning a RIF should articulate and document the employer's explanation of the business reasons leading to a decision to conduct a layoff. Generally, absent evidence that the employer's actions are inconsistent with its stated reasons for the layoff, the employer's explanation of the business reasons for a layoff will be accepted. Courts are generally reluctant to second-guess an employer's business judgment. See, *EEOC v., Louisiana Office of Community Services*, (5th Cir. 1995). At the time of the layoff, the employer may want to consider disseminating timely, and carefully worded information to the workforce and the public about the anticipated reduction in force. This may minimize rumors and at the same time document the business justification for the RIF.

Once the information documenting the necessity for the RIF has been compiled, the next step is to articulate and document the basis for determining the number of positions which will be eliminated. This usually involves: (1) determining the positions and skills within each work unit which must be retained to achieve the business goals of the organization. (To avoid assertions that individual employees or classes of employees were targeted, this assessment should precede a review of the skills of the individual employees in those positions.) (2) Establishing criteria for determining which particular positions an employer will eliminate within a work unit to achieve the articulated business goals.

B. Selecting Individuals for Layoff

Once the affected positions have been identified, an employer should establish and standardize the methodology and criteria to be used in selecting individual employees for lay off. To the extent possible, objective criteria should be used rather than subjective criteria. The more subjective the decision-making process, the more vulnerable it is to attack in litigation. See *Fowler v. Blue Bell, Inc.,* (11th Cir. 1984).

In determining the individuals who will be laid off in a RIF, one question is whether there is a collective bargaining agreement which permits more senior employees to bump less senior employees within the same classification. For employees not covered by a collective bargaining agreement, bumping is not required by federal law. However, state laws and employer policies should be consulted to determine whether bumping rights exist as a matter of policy.

C. Employee Evaluations and Rankings

Typically, a layoff will require an employer to select among employees in the same job classification. There are numerous systems that can be used to rank employees. The safest is probably length of service, which is completely objective. Most employers, however, view a reduction in force as an opportunity to eliminate less productive employees; or view it to be a business necessity to retain those employees who are most productive in order to accomplish the employer's mission with the smaller number of employees who will be available after the reduction in force. Whatever criteria are used must be job related, and performance based.

In evaluating performance, one issue that frequently arises is the weight to be given to past performance evaluations. Some courts have found past performance evaluations to be legitimate selection criteria for a RIF. Typically, however, past evaluations are only one aspect of the selection criteria. Others may include previous disciplinary action, attendance, objectively measurable productivity, such as sales performance, etc. See *Tidwell v. Carter Products*, (11th Cir. 1998).

If an employer does not want its ranking process to be governed by past performance evaluations even in part, employees and jurors may consider any selection process which ignores good performance evaluations to be unfair. If the employer determines that it does not want to rely on past performance evaluations, the rationale for that decision should be explained in a document which will likely end up as a trial exhibit.

D. Selecting the RIF Decision Makers

It is not uncommon for the persons involved in the selection process to end up having to defend that process in litigation. Therefore, the people who possess the greatest knowledge about the affected employees and their performance and qualifications should be included in the selection process. In addition, more than one supervisor or manager should participate in each selection decision. This not only reduces the risk of the decision being affected by bias, but also creates more potential witnesses who are able to explain the decision in the event that it is challenged in litigation. It is not unusual to form a committee or team to apply the selection criteria which have been established to the pool of employees eligible for the RIF to reach a consensus on who should be laid off in the RIF. Where possible, that team should include employees of different races, sexes and ages. *Moulds v. Wal-Mart Stores, Inc.*, (11th Cir. 1991).

Once the selection criteria are established and the decision makers are chosen, the employer should conduct training of those decision makers relating to the selection criteria and the procedures to be used during the RIF. In addition, an employer should educate those involved in making RIF decisions about equal employment law. Part of the package provided to each of the decision makers should include a written set of selection criteria and a document that explains discrimination laws and which confirms the employer's commitment to comply with those laws.

E. Creating a Record of the Selection Decision

In defending the decisions made in a RIF, the employer will have to produce evidence that it used legitimate, non-discriminatory reasons for selecting a particular employee for layoff instead of other candidates. For that reason, the selection process should be documented, showing how the employer applied its selection criteria. Great care should be used in creating that written record of the selection process. One approach is to use an evaluation form for each candidate to consider performance-based and job related criteria. If the evaluation form is used as a tool to consider performance-based criteria and to exclude factors that are not job related, the chances of successfully defending the layoff decisions will be improved. See, *Earley v. Champion International Corp.*, (11th Cir. 1990). Such an evaluation form may eventually be used as a trial exhibit. Therefore, the form should be designed to be easily comprehensible to a judge and jury, as well as to those supervisors who are performing the evaluation.

After the initial decisions are made as to who will be laid off in the RIF, the decision should be reviewed by a higher level of supervision or a review committee to insure that the established selection criteria were followed. Where possible, the employer should include minorities, women and older employees on any such review committee.

After the initial layoff decisions are made, an employer should conduct an adverse impact analysis of the tentative layoff list in order to determine whether there are any patterns which would support a claim of discrimination. Such a review should be done under the direction of counsel to protect the results under attorney-client privilege. If such a pattern exists, the selection decision should be subjected to additional scrutiny before being implemented. Where there is evidence that a layoff has a disproportionate impact on a protected group (i.e., employees over the age of 40), the employer may want to make appropriate adjustments to the layoff list to eliminate or minimize such impact on any protected group.

In addition to being concerned about layoff decisions which have a disproportionate impact upon protected groups based on race, gender, age or national origin, the employer should also consider whether the layoff decisions affect whistleblowers, employees with prior discrimination or sex harassment complaints, employees on pregnancy leave, family leave or other medical leave, or employees who are about to vest in a retirement plan.

F. Completing the Layoff Process

The layoff plan should consider placing affected employees in available open positions for which the employees are qualified. If an employer makes an effort to place employees internally, it should create documentation to explain or verify that effort. If an employee could not be placed internally, documentation should be created to explain the reason. An employer contemplating a RIF should also develop a policy on rehiring laid off employees and notify affected employees of the procedure to apply for future vacancies. Laid off employees should be permitted to apply for future open positions for which they are qualified. The failure to do so is evidence of a discriminatory intent. See, *Fugatev v. Allied Corp.*, (N.D. Ill. 1984) (Employer failed to offer open positions to plaintiff when it offered similar positions to younger individuals.) However, an employer may want to develop a policy requiring that an employee

who accepts rehire within a certain period of time after a RIF, must pay back any severance pay received as part of the reduction in force as a condition of rehire.

The announcement of layoff decisions should be done carefully by management. The emphasis should be placed on the business justification for the layoff, while providing the employee with general information regarding his or her inclusion on the layoff list. There should always be a witness in such meetings to prevent disputes about what was said.

There is no good time to tell an employee that he or she will be laid off. However, the announcement should not be made too far in advance, in order to avoid employing individuals who may be angry at the company or their supervisors.

A hiring freeze should be instituted during a layoff and for some period of time thereafter. Evidence that an employer hired a new employee in a position the same as or similar to a terminated employee's position could be difficult to defend in a disparate treatment suit. See, *McMahon v. Libby-Owens-Ford*, (6th Cir. 1989).

For several reasons, not the least of which is that it will cause a jury to look more kindly on the employer, an employer executing a reduction in force may wish to take steps to assist laid off employees with outplacement services, applying for unemployment, and using the employer's Employee Assistance Program.

III. WARN ACT ISSUES IN A REDUCTION IN FORCE

The federal Workers' Adjustment and Retraining Notification Act (WARN) was adopted to require employers with 100 or more employees to give 60 days' notice prior to laying off or terminating 50 or more employees. In lieu of the required WARN notice, an employer will owe each affected employee 60 days' back pay in addition to benefits. An employer who violates the WARN Act may also be subject to a $500.00 per day penalty to the local government in whose jurisdiction the reduction in force occurred as well as possible attorneys' fees in litigation.

A. Which Employers Are Covered by WARN?

WARN applies to any "business enterprise" employing 100 or more full-time employees, or 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 straight time hours per week. These coverage thresholds are calculated by adding up all employees at all of the locations of the employer, not just the affected location. Workers on a temporary layoff or leave of absence who have a reasonable expectation of recall would also be counted as employees in determining whether an employer was covered.

B. What Is a "Business Enterprise"?

The term "employer" includes non-profit organizations of the requisite size. Regular Federal, State, local and federally recognized Indian tribal governments are not covered. However, the term "employer" includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular government, which have their own governing bodies and which have independent authority to manage their personnel and assets.

Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.)

C. What Notice is Required?

Sixty days before a "plant closing" or "mass layoff," a covered employer must notify its affected employees, unions and local and state government officials about the impending reduction in force.

D. What is a Plant Closing?

A plant closing is the permanent or temporary shutdown of a single site of employment or one or more operating units within a site during a 30 day period that results in the employment loss of 50 or more full-time employees.

E. What is a Mass Layoff?

A mass layoff is defined as a reduction in an employer's workforce that is not the result of a plant closing, but which produces an employment loss at a single site of employment during any 30 day period involving (i) 50 or more full-time employees, provided that those affected by the layoff constitute at least 33% of the full-time workforce at the site; or (ii) at least 500 full-time employees regardless of what percentage of the workforce the affected employees constitute. A mass layoff may occur regardless of whether a facility or operating unit is shut down at a site. Part-time employees and employees who are transferred to other locations of the same employer are not counted when determining whether a mass layoff has occurred.

F. What Is a Single Site of Employment?

A single site of employment has been defined by the Department of Labor Regulations promulgated under the WARN Act as a building or group of buildings in reasonable geographic proximity, used for the same purposes, and which share the same staff and equipment. The Sixth Circuit Court of Appeals has ruled in *Teamsters' Local Union 413 v. Drivers', Inc.*, (6th

Cir. 1996), that 11 truck terminals maintained by an employer did not constitute a single site of employment under the WARN Act because the terminals were not geographically contiguous but hundreds of miles apart and spread over six states, with each driver starting and ending his week at the same assigned terminal, and because the terminals did not share the same equipment or services. In determining whether several facilities of an employer constitute a single site of employment, there is no clear cut test to utilize in applying the factors cited in the Department of Labor Regulations. Each case needs to be reviewed on a case-by-case basis in light of the court decisions that are current at that time.

G. What Is an Employment Loss?

Plant closings and mass layoffs are covered by the WARN Act only if a sufficient number of employees suffer an employment loss. An employment loss is defined as (i) an employment termination other than a discharge for cause, voluntary departure or retirement; or (ii) a layoff exceeding six months; or (iii) a reduction in work hours by more than 50% during each month in a six month period.

Employees who are transferred to other positions subsequent to a mass layoff or plant closing with no break in employment are not considered to have suffered an employment loss and therefore are not counted when determining whether a mass layoff has occurred. This includes employees who have accepted a transfer to a different location of the company.

When a Company's operations are purchased by another company, no employment loss occurs upon the termination of the employees by the selling company if the employees continue to work in their same positions after the purchase for the buyer.

H. What Is a Part-Time Employee?

Part-time employees are not counted in determining whether a plant closing or mass layoff has occurred. A part-time employee is defined as an individual who is employed for (i) an average of fewer than 20 hours per week; or (ii) who has been employed for fewer than six of the twelve months preceding the WARN notice date. However, even though part-time employees are not counted in determining whether a plant closing or mass layoff has occurred, they are considered affected employees if there is a plant closing or mass layoff and must be provided a WARN notice if the numerical thresholds of a plant closing or mass layoff have been met.

I. What Is an Affected Employee?

Other than temporary employees, all employees who may reasonably be expected to experience an employment loss as a result of a plant closing or mass layoff are "affected employees" for purposes of the WARN Act.

An employer is required to give a WARN notice not only to those workers whose jobs will be eliminated, but also to other workers who may be displaced due to bumping rights under a union contract.

J. What Type of Notice is Required by the WARN Act?

The statute requires that an employer notify four parties: (1) the affected non-union employees; (2) the union representative of affected unionized employees; (3) the state's dislocated worker union; and (4) the chief executive officer of the local government where the plant closing or mass layoff is to occur. Each of these separate notices has its own special requirements under the WARN Act and regulations.

Where employees are not represented by a union, notice must be given directly to each affected worker by any reasonable method of delivery, including mailing, personal delivery, or insertion of a notice in employees' pay envelopes.

Unionized workers are deemed notified if a notice is given to their union representative. In that event, no notice is required to be given to the affected employees represented by the union.

Each state is required to have a dislocated worker unit. If the state has not established such a unit, service of the notice on the state's governor will satisfy this requirement.

With respect to notice to the chief elected officer of the local government, when a covered employment site is located in more than one unit of local government, notice must be given to the local government to which the employer directly paid the highest taxes for the preceding year. If in doubt, all affected local government should be sent a WARN notice.

K. What Notice is Required Upon a Sale of All or Part of a Business?

The WARN Act requires that in the case of a sale of all or part of a business, the selling employer must provide 60 days' notice to affected employees of WARN events which occur up to and including the effective date of the sale. After the effective date, the purchasing employer is responsible for providing WARN notices.

The sale of a business itself is not a WARN event and does not trigger the notice requirements. Although a technical termination of the seller's employees may occur when the sale becomes effective, the WARN notice is only required where the employees actually experience a loss of employment.

L. What Exceptions May Reduce the Notice Requirements Under the WARN Act?

The WARN Act contains three limited conditions under which the 60 day notice requirement may be reduced. Even if the notice requirement is reduced, the statute requires the employer to give as much notice as practicable and to provide a brief statement explaining why the shortened notice period was necessary. The exceptions are set forth below:

1. The Faltering Company Exception

This exception applies to companies that are trying to stay in business by seeking additional capital or business, and only applies to plant closings. In order to take advantage of this exception, four conditions must be met:

(i) the employer must have been actively seeking capital or business at the time the 60 day notice would have been required;

(ii) there must have been a realistic opportunity to obtain the financing or business sought;

(iii) the employer must show that the financing or business sought would have been enabled the employer to avoid or postpone the shutdown for a reasonable period of time if it had been obtained; and

(iv) the employer must demonstrate that it reasonably and in good faith believed that giving the required notice would have precluded it from obtaining the needed capital or business.

2. The Unforeseeable Business Circumstance Exception

The notice period may also be reduced when the triggering event is caused by business circumstances that were not reasonably foreseeable 60 days prior to the mass layoff or plant closing. The employer's reasonable business judgment dictates the scope of the unforeseeable business circumstance exception. Loehrer v. McDonnell Douglas Corp., 98 F.3d 1056, 1061 (8th Cir. 1996). Even under the unforeseeable business circumstance exception, however, notification is required as soon as practicable. Burnside v. MJ Optical, Inc., 128 F.3d 700 (8th Cir. 1997), cert. denied 118 S.Ct. 1797 (1998) (holding that an employer violated the Act when it did not give its employees notice of an imminent closing on the date of the sale, but only gave the notice two days later). This exception may well be applicable to closings or layoffs caused by the COVID-19 pandemic. However, as time goes by, the relationship between the pandemic and the reduction in force will be more attenuated.

3. The Natural Disaster Exception

The 60-day notice period may be reduced when a natural disaster occurs which results in a loss of employment. Such natural disasters include flood, drought, earthquake, storm, tidal wave, and other similar disasters. An employer must be able to demonstrate that its closing or layoff was a direct result of the natural disaster. Under existing case law, it is questionable whether this exception would apply to the current COVID-19 pandemic

Two other exemptions eliminate the 60-day notice period. One is where employees are hired with the understanding that their employment is limited to the duration of a project and it is understood that employment is temporary. The second is in the event of a plant closing or mass layoff which results from an economic strike or lockout which is not intended to evade the requirements of the WARN Act.

Employers in certain states may also be subject to state versions of the WARN Act, often referred to as mini-WARN Acts. State WARN Acts may cover employers not covered by the federal WARN Act; or may apply to plant closing or layoffs that would not be

covered by the federal WARN Act; or contain different notice requirements than the federal WARN Act.

M. ENFORCEMENT AND PENALTIES

The WARN Act allows affected employees, their representatives, or the local government unit to sue individually or in a class action. An employer who violates WARN must pay back pay and benefits to each affected employee for every day of the violation up to a maximum of 60 days. Although some courts have interpreted this 60 day back pay requirement to refer to 60 work days (see *United Steel Workers of America v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), the majority of courts have applied the rule of 60 calendar days (see e.g., *Carpenters District Council v. Dillard Department Stores, Inc.*, 15 F.3d 1275 (5th Cir. 1994).

The benefits required to be paid under WARN include contribution to the employees' retirement plan and maintenance of the employees' welfare benefit plan coverage. Punitive damages are not available for violations of the WARN Act but attorneys' fees may be awarded to a successful plaintiff.

IV. Severance Pay and Releases

In planning for a reduction in force, an employer should evaluate its severance policy. If there is a severance pay plan, it should be examined to determine that it complies with the Employee Retirement Income Security Act (ERISA). If changes to the severance plan are necessary, it should be amended as far in advance of the reduction in force as possible. In a sale of a business, employees who are separated by the seller may be offered a job by the purchaser. Unless the severance pay plan specifically states that employees who are offered a job by the purchaser are not eligible for severance pay, the employees will be entitled to a severance pay benefit from the plan.

An employer may require employees to sign a release and waiver of claims as consideration for severance benefits. However, such a requirement must be recited in the severance pay plan. Some employers have adopted severance pay plans with one level of severance benefits regardless of whether a release is signed, and a higher level of severance benefits if a release is signed. Such an arrangement also must be fully spelled out in the severance pay plan.

Employers should also amend their severance pay plans to specify that the amount of severance required under the plan is reduced by any payments which are made to comply with the WARN Act. Amounts paid under a severance plan will not be reduced or eliminated because of any payments required by WARN unless the severance plan specifically provides for such a reduction in severance pay equal to the amount of the payments made under WARN.

Some of the most important issues involving the validity of releases arise under the Age Discrimination in Employment Act (ADEA), as that statute was amended by the Older Workers'

Benefit Protection Act (OWBPA). The OWBPA requires that in a reduction of force situation in which more than one person is subject to being laid off, employees be given up to 45 days to consider whether or not to sign a release (as opposed to 21 days when one person is asked to sign a release). The statute also requires employers to provide employees who are asked to sign a release with information which will allow them to make an informed decision, including certain specified information. The required information includes: the requirements of the group layoff program, the applicable time limits, the criteria for eligibility for selection for the layoff and a reduction in force, the job titles and ages (but not names), of persons selected for layoffs, and the ages of all individuals in the same job classification or organizational unit who are not selected for layoff.

If an employer does not comply with all of the technical OWBPA requirements, employees may sign a release, obtain severance benefits, and subsequently file suit under the ADEA. See *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 118 S. Ct. 838, 841 (1998). In *Oubre*, the U.S. Supreme Court ruled that a release which fails to comply with the OWBPA does not bar a subsequent ADEA suit even if the plaintiff has not tendered back the benefits received for signing the release.

In addition, the Equal Employment Opportunity Commission (EEOC) has issued regulations governing waivers of rights of claims under the ADEA and OWBPA. The EEOC regulation contains the following guidance:

1. Wording of Waiver Agreements

The regulation provides that waivers must be in writing and drafted in plain language geared to the level of understanding of the individuals asked to sign the agreement. The waiver also must not be misleading and must not exaggerate the benefits or minimize the limitations of accepting the waiver agreement.

2. Waiver of Future Rights

The OWBPA provides that a waiver will not be effective if it includes a waiver of rights and claims arising after the execution of the waiver. The regulations explain that this provision does not bar agreements to perform future employment-related actions, such as an employee's agreement to retire or terminate employment at a future date.

3. Consideration

Under the OWBPA, the employer must provide to an employee asked to sign a waiver something of value to which the individual is not already entitled. If the employer's severance pay plan document does not require a release in exchange for severance pay, then something in addition to severance pay must be given to the employee in order to make the release valid and binding.

4. Time Periods

The OWBPA requires that an individual have 21 days to consider a waiver agreement if only one person is involved in the employment action, but that if two or more individuals in a group or class of employees are offered a release in connection with an employment termination program, they must be given 45 days to consider the offer. Further, all employees accepting a release have a period of seven days after they have accepted the release in order to revoke their agreement.

If material changes are made to a waiver agreement after it is initially offered to an employee, then the 21 day or 45 day period will restart from the time the material changes are made, unless the parties provide to the contrary in the waiver agreement itself. An employee who is offered a release may sign the release prior to the expiration of the 21 day or 45 day period, provided that the individual's acceptance of the shorter time period is knowing and voluntary, and not induced by fraud, misrepresentation, threat of withdrawal or alteration of the offer prior to the expiration of the 21 day or 45 day period. The waiver also may not offer better terms to individuals who signed the waiver before the applicable time period expires. The 7-day revocation period may not be shortened or waived. The time frames recited above do not apply in cases involving settlement of an EEOC charge or lawsuit, and in those cases, the time period for consideration need only be reasonable under the circumstances.

V. Early Retirement Offers

If structured carefully, it is legally permissible under both the Age Discrimination In Employment Act (ADEA) and Employees' Retirement Income Security Act (ERISA) to offer an incentive for employees to retire earlier than they might ordinarily have planned. This is one method of effecting a reduction in force without a layoff. One of the benefits of an early retirement offer is that the choice to accept the offer and retire is voluntary on the part of the employee, so that an employer does not have to make decisions as to how to reduce the workforce which may be challenged later in litigation. One other advantage of an early retirement offer over a reduction in force is that if structured carefully, much of the cost of providing benefits to employees in an early retirement offer can be borne by the employer's retirement plan. This can be especially useful if the employer has a defined benefit plan which is over funded.

There are also disadvantages to an early retirement offer. Because it is voluntary, and because of the way early retirement offers must be structured, an employer does not have complete control as to the number or identity of those employees who accept the early retirement offer. The result is that the employer may end up losing valuable employees whom it would have preferred to continue at employment. On the other hand, in a reduction of force, termination of benefits are most likely to be provided through severance payments, which are generally funded through the employer's general assets.

A voluntary early retirement offer must comply with both ERISA and the ADEA. In order to comply with the ADEA, it must not be structured in a way that adversely affects older

employees. The Equal Employment Opportunity Commission has issued extensive regulations on the structuring of early retirement programs under the ADEA to ensure that they do not directly or indirectly discriminate against older workers.

In addition, a voluntary early retirement offer must comply with ERISA. There are several ERISA issues relating to early retirement offers which need to be considered. First, it is permissible under ERISA and the Internal Revenue Code for the assets of a retirement plan to be used to provide incentives for employees to accept the early retirement offer. However, the retirement plan must be formally amended in order to provide such incentives. Under the IRS regulations, an early retirement offer is subject to the non-discriminatory regulations of the Internal Revenue Code if the assets of a qualified retirement plan are used to fund the retirement incentive in whole or in part. The IRS regulations require that the program be administered on a non-discriminatory basis. Specifically, an early retirement offer must comply with the three fundamental requirements set forth in the non-discriminatory regulations under the Internal Revenue Code:

(1) The amount of the plan benefits must not discriminate in favor highly-compensated employees;

(2) The availability of the plan benefits, rights and features must not discriminate in favor of highly-compensated employees; and

(3) The timing of the amendment to the retirement plan creating the early retirement window must not have a discriminatory effect in favor of highly-compensated employees.

Employees affected by a reduction in force may also attempt to pursue claims of discrimination under ERISA § 510, 29 U.S.C. § 1140. ERISA § 510 prohibits discrimination against employees for exercising their rights under a plan and prohibits interference with the attainment of any rights to which employees may become entitled under a plan. This provision generally prohibits an employer from taking an adverse employment action to prevent an employee from asserting his rights under a retirement plan, and is aimed at preventing employers from terminating employees just before their right to pension or other benefits vest. Section 510 has been applied by the courts to preclude lay off selections which are made for the purpose of reducing the cost of providing employee benefits, see *Stiltner v. Beretta, USA Corp.* (4th Cir. 1995). However, the mere fact that a lay off causes an employee to lose future benefits and benefit coverage does not violate ERISA § 510. In order for there to be a violation of § 510, the employer must have intended to interfere with the employee's entitlement to benefits.

Voluntary early retirement programs are normally limited to employees at or near retirement age, and normally augment existing qualified retirement plan benefits to induce a retirement at an earlier age. In some cases, employers only offer incentive programs to employees who are already eligible for immediately commencing retirement benefits; in other cases, employers offer early retirement incentive programs to persons nearing retirement benefit eligibility and make such individuals eligible for retirement benefits immediately.

Employers offer a variety of benefits under early retirement programs, including:

(1) lowering requirements for immediate commencement of retirement benefits;

(2) easing or eliminating the actuarial reduction for early retirement, such as by adding five years to an employee's age for early retirement plan benefit computation purposes;

(3) increasing retirement benefits, such as by adding five years to an employee's service for retirement plan benefit computation benefit purposes;

(4) providing a complete or partial Social Security supplement to provide a bridge for an employee until Social Security benefits commence;

(5) paying special periodic or lump sum severance benefits (under a qualified plan or outside of it);

(6) providing retiree medical benefits, subsidized COBRA health continuation coverage, or other similar benefits;

(7) providing continued group insurance coverage paid for by the employer;

(8) providing outplacement assistance;

(9) vesting pension, profit sharing, stock bonus or savings plan benefits;

(10) vesting stock options; and

(11) paying prorated partial year bonuses.

Employees who accept the voluntary early retirement program may be asked to sign a release in exchange for the early retirement benefit. Such a release must comply with all of the requirements of the Older Workers Benefit Protection Act and the EEOC regulations on releases.

2. Action Plan and Timetable for Reduction in Force

Action Item	Responsible	Due Date	Date Completed/ Pending
Develop business rationale for RIF			
Determine cost savings required			
Determine departments/profit centers to be affected by RIF (Decisional Unit(s)			
Consider whether to offer severance package			
Determine structure of severance package; pay, health insurance, outplacement, etc.			
Review/revise and/or create severance pay policy			
Consider hiring freeze			
Consider whether to pay out sick or vacation leave (note: payment of vacation leave may be required by state law)			
Consider voluntary early retirement offer			
Develop a timeline for reduction in force			
Determine decision-makers for each Decisional Unit			
Obtain legal review of downsizing plan			

Action Item	Responsible	Due Date	Date Completed/ Pending
Train decision-makers			
Determine whether layoff selections will be made by seniority or employee selection			
If workforce is union, review collective bargaining contract			
Develop selection matrix (if selection process)			
Preparation of selection criteria matrix form for each employee in Decisional Unit(s)			
Create initial list of employees to be laid off			
Consider retention bonus agreements for critical employees			
Consider whether WARN Act or state WARN laws apply			
Consider immigration issues if any foreign nationals on temporary work visas are being laid off			
Perform adverse impact analysis			
Review layoff list for potential retaliation claims			
Finalize list of employees to be laid off			
Plan layoff announcements			
Consider whether to have security at layoff meetings			

Action Item	Responsible	Due Date	Date Completed/ Pending
Plan retrieval/return of employee property, company vehicles, laptops, company credit cards, cell phones, etc.			
Plan cutoff of IT access, building access			
Prepare script for layoff meetings			
Prepare layoff packet for each affected employee			
Consider outplacement, unemployment comp assistance, EAP			
Prepare severance agreements/releases			
Prepare OWBPA memos			
Prepare WARN Notices			
Prepare public relations statement			
Prepare communications to remaining workforce regarding reduction in force			
Layoff meetings with each affected employee			
Process final payroll and expense reimbursement			
Send COBRA notices			

3. EEOC Guidance on the Older Workers Benefit Protection

The U.S. Equal Employment Opportunity Commission - July 2009
https://www.eeoc.gov/policy/docs/qanda_severance-agreements.html

Understanding Waivers of Discrimination Claims in Employee Severance Agreements

I. Introduction

Employee reductions and terminations have been an unfortunate result of the current economic downturn. Even in good economic times, however, businesses of every size carefully assess their operational structures and may sometimes decide to reduce their workforce. Often, employers terminate older employees who are eligible for retirement, or nearly so, because they generally have been with the company the longest and are paid the highest salaries. Other employers evaluate individual employees on criteria such as performance or experience, or decide to lay off all employees in a particular position, division, or department. An employer's decision to terminate or lay off certain employees, while retaining others, may lead discharged workers to believe that they were discriminated against based on their age, race, sex, national origin, religion, or disability.

To minimize the risk of potential litigation, many employers offer departing employees money or benefits in exchange for a release (or "waiver") of liability for all claims connected with the employment relationship, including discrimination claims under the civil rights laws enforced by the Equal Employment Opportunity Commission (EEOC) -- the Age Discrimination in Employment Act (ADEA), Title VII, the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA). While it is common for senior-level executives to negotiate severance provisions when initially hired, other employees typically are offered severance agreements and asked to sign a waiver at the time of termination. When presented with a severance agreement, many employees wonder: Is this legal? Should I sign it?

This document answers questions that you may have if you are offered a severance agreement in exchange for a waiver of your actual or potential discrimination claims. Part II provides basic information about severance agreements; Part III explains when a waiver is valid; and Part IV specifically addresses waivers of age discrimination claims that must comply with provisions of the Older Workers Benefit Protection Act (OWBPA). Finally, this document includes a checklist with tips on what you should do before signing a waiver in a severance agreement and a sample of an agreement offered to a group of employees giving them the opportunity to resign in exchange for severance benefits.

II. Severance Agreements and Release of Claims

A severance agreement is a contract, or legal agreement, between an employer and an employee that specifies the terms of an employment termination, such as a layoff. Sometimes this agreement is called a "separation" or "termination" agreement or "separation agreement general release and covenant not to sue." Like any contract, a severance agreement must be supported by "**consideration**." Consideration is something of value to which a person is not already entitled that is given in exchange for an agreement to do, or refrain from doing, something.

The consideration offered for the waiver of the right to sue cannot simply be a pension benefit or payment for earned vacation or sick leave to which the employee is already entitled but, rather, must be something of value *in addition* to any of the employee's existing entitlements. An example of consideration would be a lump sum payment of a percentage of the employee's annual salary or periodic payments of the employee's salary for a specified period of time after termination. The employee's signature and retention of the consideration generally indicates acceptance of the terms of the agreement.

What does a severance agreement look like?

A severance agreement often is written like a contract or letter and generally includes a list of numbered paragraphs setting forth specific terms regarding the date of termination, severance payments, benefits, references, return of company property, and release of claims against the employer. If your employer decides to terminate you, it may give you a severance agreement similar to the one that follows:

> *Example 1: This letter sets forth our agreement with respect to all matters that pertain to your employment and separation from employment by [your organization] ("the Company").*
>
> 1. *Termination of Employment. You will cease to be employed by the Company on X date.*
>
> 2. *Severance Payments. The Company agrees to pay you X weeks of severance pay. The severance pay will be in addition to the payment of unused accrued vacation pay to which you are entitled. You may elect to receive this severance pay in the form of a lump sum payment, or spread it over a number of weeks, less applicable deductions for taxes.*
>
> ***
>
> 7. *General Release. You agree that the consideration set forth above, which is in addition to anything of value to which you are or might otherwise be entitled, shall constitute a complete and final settlement of any and all causes of actions or claims you have had, now have or may have up to the date of this agreement including, without limitation, those arising out of or in connection with your*

employment and/or termination by the Company pursuant to any federal, state, or local employment laws, statutes, public policies, orders or regulations, including without limitation, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act, the Americans with Disabilities Act, and [certain state] laws.

Agreements that specifically cover the release of age claims will also include additional information intended to comply with OWBPA requirements. *See* Part IV.A, Question and Answer 6.

> *Example 2: This agreement is intended to comply with the Older Workers Benefit Protection Act. You acknowledge and agree that you specifically are waiving rights and claims under the Age Discrimination in Employment Act.*

III. Validity of Waivers – In General

Most employees who sign waivers in severance agreements never attempt to challenge them. Some discharged employees, however, may feel that they have no choice but to sign the waiver, even though they suspect discrimination, or they may learn something after signing the waiver that leads them to believe they were discriminated against during employment or wrongfully terminated.

If an employee who signed a waiver later files a lawsuit alleging discrimination, the employer will argue that the court should dismiss the case because the employee waived the right to sue, and the employee will respond that the waiver should not bind her because it is legally invalid. Before looking at the employee's discrimination claim, a court first will decide whether the waiver is valid. If a court concludes that the waiver is *invalid*, it will decide the employee's discrimination claim, but it will dismiss the claim if it finds that the waiver is valid.

A waiver in a severance agreement generally is valid when an employee **knowingly and voluntarily** consents to the waiver. The rules regarding whether a waiver is knowing and voluntary depend on the statute under which suit has been, or may be, brought. The rules for waivers under the Age Discrimination in Employment Act are defined by statute – the Older Workers Benefit Protection Act (OWBPA). Under other laws, such as Title VII, the rules are derived from case law. In addition to being knowingly and voluntarily signed, a valid agreement also must: (1) offer some sort of consideration, such as additional compensation, in exchange for the employee's waiver of the right to sue; (2) not require the employee to waive future rights; and (3) comply with applicable state and federal laws.

What determines whether a waiver of rights under Title VII, the ADA, or the EPA was "knowing and voluntary"?

To determine whether an employee knowingly and voluntarily waived his discrimination claims, some courts rely on traditional contract principles and focus primarily on whether the language in the waiver is clear. Most courts, however, look beyond the contract language and consider all relevant factors – or the totality of the circumstances -- to determine whether the employee knowingly and voluntarily waived the right to sue. These courts consider the following circumstances and conditions under which the waiver was signed:

- whether it was written in a manner that was clear and specific enough for the employee to understand based on his education and business experience;

- whether it was induced by fraud, duress, undue influence, or other improper conduct by the employer;

- whether the employee had enough time to read and think about the advantages and disadvantages of the agreement before signing it;

- whether the employee consulted with an attorney or was encouraged or discouraged by the employer from doing so;

- whether the employee had any input in negotiating the terms of the agreement; and

- whether the employer offered the employee consideration (e.g., severance pay, additional benefits) that exceeded what the employee already was entitled to by law or contract and the employee accepted the offered consideration.

  Example 3: An employee who was laid off from her position at an automobile assembly plant agreed to release her employer from all claims in exchange for a $100,000 severance payment. After signing the waiver and cashing the check, she filed a lawsuit alleging that she was harassed and discriminated against by her coworkers during her employment. A court found that the employee's waiver was knowing and voluntary by looking at the totality of circumstances surrounding its execution: the employee graduated from college and completed paralegal classes that included a course in contracts; she had no difficulty reading; the agreement was clear and unambiguous; she had ample time to consider whether to sign it; she was represented by counsel; the cash payment provided by the employer was fair consideration; and she did not offer to return the payment she received for signing the waiver.

  Example 4: An employee was informed that his company was downsizing and that he had 30 days to elect voluntary or involuntary separation. The employee chose voluntary separation in exchange for severance pay and additional retirement benefits and signed a waiver, which stated: "I . . . hereby release and discharge [my employer] from any and all claims which I have or might have, arising out of or related to my employment

or resignation or termination." The employee later filed suit alleging that he was terminated based on his race and national origin.

In finding that the employee's waiver was not knowing and voluntary, a court noted that although the language of the agreement was "clear and unambiguous," it failed to specifically mention the release of employment discrimination claims. Because the employee was only high school educated and unfamiliar with the law, his argument that he believed he only was releasing claims arising from his voluntary termination and the benefits package he accepted was "not an unreasonable conclusion."

May I still file a charge with the EEOC if I believe that I have been discriminated against based on my age, race, sex, or disability, even if I signed a waiver releasing my employer from all claims?

Yes. Although your severance agreement may use broad language to describe the claims that you are releasing (*see* Example 1), you can still file a charge with the EEOC if you believe you were discriminated against during employment or wrongfully terminated. In addition, no agreement between you and your employer can limit your right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC under the ADEA, Title VII, the ADA, or the EPA. Any provision in a waiver that attempts to waive these rights is invalid and unenforceable.

If I file a charge with the EEOC after signing a waiver, will I have to return my severance pay?

No. Because provisions in severance agreements that attempt to prevent employees from filing a charge with the EEOC or participating in an EEOC investigation, hearing, or proceeding are unenforceable (*see* Question and Answer 3 above), you cannot be required to return your severance pay --or other consideration --before filing a charge.

Will I have to return my severance pay if I file a discrimination suit in court after signing a waiver?

Under the ADEA, an employee is not required to return severance pay -- or other consideration received for signing the waiver -- before bringing an age discrimination claim. Under Title VII, the ADA, or the EPA, however, the law is less clear. Some courts conclude that the validity of the waiver cannot be challenged unless the employee returns the consideration, while other courts apply the ADEA's "no tender back" rule to claims brought under Title VII and other discrimination statutes and allow employees to proceed with their claims without first returning the consideration.

Even if a court does not require you to return the consideration before proceeding with your lawsuit, it may reduce the amount of any money you are awarded if your suit is successful by the amount of consideration you received for signing the waiver. *See* Part IV.A. Question and Answer 9.

IV. Waivers of ADEA Claims

A. General Requirements for Employees Age 40 and Over

In 1990, Congress amended the ADEA by adding the Older Workers Benefit Protection Act (OWBPA) to clarify the prohibitions against discrimination on the basis of age. OWBPA establishes specific requirements for a "knowing and voluntary" release of ADEA claims to guarantee that an employee has every opportunity to make an informed choice whether or not to sign the waiver. There are additional disclosure requirements under the statute when waivers are requested from a group or class of employees. *See* "Additional Requirements for Group Layoffs of Employees Age 40 and Over" at IV. B.

What makes a waiver of age claims knowing and voluntary?

OWBPA lists seven factors that must be satisfied for a waiver of age discrimination claims to be considered "knowing and voluntary." At **a minimum**:

- **A waiver must be written in a manner that can be clearly understood.** EEOC regulations emphasize that waivers must be drafted in plain language geared to the level of comprehension and education of the average individual(s) eligible to participate. Usually this requires the elimination of *technical jargon* and *long, complex sentences*. In addition, the waiver must not have the effect of *misleading, misinforming*, or *failing to inform* participants and must present any advantages or disadvantages without either *exaggerating the benefits* or *minimizing the limitations*.

  Example 5: An employee, who had worked for his company for 28 years, was selected for an involuntary RIF and asked to sign a "General Release and Covenant Not to Sue" (severance agreement) in exchange for money. The severance agreement provided, among other things, that the employee "released" his employer "from all claims . . . of whatever kind," including claims under the ADEA and any other federal, state, or local law dealing with discrimination in employment. The severance agreement also referenced "covenants not to sue" and stated that "[t]his covenant not to sue does not apply to actions based solely under the [ADEA]." After reading the severance agreement, the employee asked his supervisor if the exception for ADEA claims contained in the covenant not to sue meant he could sue the employer if his suit was limited to claims under the ADEA. His supervisor contacted the employer's legal department and then sent the employee an e-mail stating, "Regarding your question on the General Release and Covenant Not to Sue, the wording is as intended. . . . . The site attorney was not comfortable providing an interpretation for you and suggested you consult with your own attorney."

  The employee signed the agreement, collected severance benefits, and then sued his employer for age discrimination under the ADEA. A court held that the severance agreement was not enforceable because it was not written in a manner calculated to be understood.

- **A waiver must specifically refer to rights or claims arising under the ADEA.** EEOC regulations specifically state that an OWBPA waiver must expressly spell out the Age Discrimination in Employment Act (ADEA) by name.

- A waiver must advise the employee in writing to consult an attorney before accepting the agreement.

  Example 6: A release stating: "I have had reasonable and sufficient time and opportunity to consult with an independent legal representative of my own choosing before signing this Complete Release of All Claims," did not comply with OWBPA's requirement that an individual be advised to consult with an attorney. Although the voluntary early retirement agreement advised employees to consult financial and tax advisors, to seek advice from local personnel representatives, and to attend retirement seminars, it said nothing about seeking independent legal advice prior to making the election to retire and accepting the agreement.

- **A waiver must provide the employee with at least 21 days to consider the offer.** The regulations clarify that the 21-day consideration period runs from the date of the employer's final offer. If material changes to the final offer are made, the 21-day period starts over.

- **A waiver must give an employee seven days to revoke his or her signature.** The seven-day revocation period cannot be changed or waived by either party for any reason.

- **A waiver must not include rights and claims that may arise after the date on which the waiver is executed.** This provision bars waiving rights regarding new acts of discrimination that occur *after* the date of signing, such as a claim that an employer retaliated against a former employee who filed a charge with the EEOC by giving an unfavorable reference to a prospective employer.

  Example 7: An employee who received enhanced severance benefits in exchange for waiving her right to challenge her layoff later filed suit. In finding the waiver valid, the court noted that because the waiver clearly stated that she was releasing any claims that she "may now have or have had," it did not require her to waive future claims hat may arise after the waiver was signed.

- A waiver must be supported by consideration in addition to that to which the employee already is entitled.

If a waiver of age claims fails to meet any of these seven requirements, it is invalid and unenforceable. In addition, an employer cannot attempt to "cure" a defective waiver by issuing a subsequent letter containing OWBPA-required information that was omitted from the original agreement.

Are there other factors that may make a waiver of age claims invalid?

Yes. Even when a waiver complies with OWBPA's requirements (*see* Question and Answer 6 above), a waiver of age claims, like waivers of Title VII and other discrimination claims, will

be invalid and unenforceable if an employer used fraud, undue influence, or other improper conduct to coerce the employee to sign it, or if it contains a material mistake, omission, or misstatement.

> *Example 8: An employee who was told that his termination resulted from "reorganization" signed a waiver in exchange for severance pay. After a younger person was hired to do his former job, he filed a lawsuit alleging age discrimination. The company then changed its position and claimed that the real reason for the employee's discharge was his poor performance. The employee argued that his waiver was invalid due to fraud and that if he had known that he was being terminated because of alleged poor performance, he would have suspected age discrimination and would not have signed the waiver. The court held that fraud was a sufficient reason for finding the waiver invalid.*

> *Example 9: An employee was terminated and given ten weeks of severance pay in exchange for signing an agreement waiving all of her potential discrimination claims. She later filed a lawsuit alleging that she was continuously passed over for promotion based on her age and sex throughout her employment. In response to the employer's attempt to dismiss her suit, she alleged that the waiver was an ultimatum which effectively gave her no choice since she was her grandchildren's guardian and her family's source of income. The court held that the employee's financial problems and prospective loss of her job did not constitute "duress" for the purpose of invalidating a waiver.*

If I am 40 years old or older, am I entitled to more severance pay or benefits than a younger employee?

No. Although severance packages often are structured differently for different employees depending on position and tenure, an employer is not required to give you a greater amount of consideration than is given to a person under the age of 40 solely because you are protected by the ADEA.

Are there any circumstances where I may have to pay my employer back the money it gave me for the waiver of my age claims?

Yes. Your employer may offset money it paid you in exchange for waiving your rights if you successfully challenge the waiver, prove age discrimination, and obtain a monetary award. However, your employer's recovery may not exceed the amount it paid for the waiver or the amount of your award if it is less.

> *Example 10: Your employer paid you $15,000 in exchange for a waiver of your age discrimination claim. You sue and convince a court that your waiver was not "knowing and voluntary" under OWBPA and that you are entitled to $10,000 in back pay and liquidated damages based on age discrimination. A court could reduce your award to zero because $10,000 is less than the $15,000 the employer already paid you for the waiver.*

Example 11: Same as Example 10, except that you are awarded $30,000 based on age discrimination. A court could not reduce your award by more than $15,000, the amount you received in exchange for the waiver. This means that you would still get $30,000 – the $15,000 your employer paid you for your waiver and an additional $15,000 awarded by the court.

If I challenge an age discrimination waiver in court, may my employer renege on promises it made in the agreement?

No. EEOC regulations state that an employer cannot "abrogate," or avoid, its duties under an ADEA waiver even if you challenge it. Because you have a right under OWBPA to have a court determine a waiver's validity, it is unlawful for your employer to stop making promised severance payments or to withhold any other benefits it agreed to provide.

Example 12: A company eliminated almost all of its direct sales positions and offered terminated employees six months of severance benefits in exchange for signing a waiver. In response to the employees' suit alleging age discrimination, the company indicated that it was suspending any further severance payments and was discontinuing other benefits provided under the waiver agreement. A court held that the company could not cut off severance payments or demand repayment of benefits because the employees filed suit challenging the validity of the waiver.

B. Additional Requirements for Group Layoffs of Employees Age 40 and Over

When employers decide to reduce their workforce by laying off or terminating a group of employees, they usually do so pursuant to two types of programs: *"exit incentive programs*" and *"other employment termination programs."* When a waiver is offered to employees in connection with one of these types of programs, an employer must provide enough information about the factors it used in making selections to allow employees who were laid off to determine whether older employees were terminated while younger ones were retained.

What is an "exit incentive" or "other termination" program?

Typically, an "exit incentive program" is a **voluntary program** where an employer offers two or more employees, such as older employees or those in specific organizational units or job functions, additional consideration to persuade them to voluntarily resign and sign a waiver. An "other employment termination program" generally refers to a program where two or more employees are **involuntarily terminated** and are offered additional consideration in return for their decision to sign a waiver.

Example 13: A bank must eliminate 20% of its 200 teller positions in a particular geographic location and decides to retain only those employees who most recently received the highest performance ratings. The bank sends a letter to 50 tellers who were rated "needs improvement" offering them six months pay if they voluntarily agree to resign and sign a waiver. This is an "exit incentive program."

Example 14: Same facts as in Example 13, but only 30 tellers voluntarily resign. The bank involuntarily lays off 10 tellers with severance pay in exchange for their waiver of age claims. This is an "other termination program."

Whether a "program" exists depends on the facts and circumstances of each case; however, the general rule is that a "program" exists if an employer offers additional consideration – or, an incentive to leave – in exchange for signing a waiver to more than one employee. By contrast, if a large employer terminated five employees in different units for cause (e.g., poor performance) over the course of several days or months, it is unlikely that a "program" exists. In both exit incentive and other termination programs, the employer determines the terms of the severance agreement, which typically are non-negotiable.

If I am in a group of employees who are being laid off and asked to sign a waiver, what information does my employer have to give to me?

Your waiver must meet the minimum OWBPA "knowing and voluntary" requirements (see Question and Answer 6 above). In addition, your employer must give you - and all other employees who are being laid off with you - written notice of your layoff and at least 45 days to consider the waiver before signing it. Specifically, the employer must inform you in writing of:

- the **"decisional unit"** -- the class , unit, or group of employees from which the employer chose the employees who were and who were not selected for the program

  Example 15: If an employer decides it must eliminate 10 percent of its workforce at a particular facility, then the entire facility is the decisional unit, and the employer has to disclose the titles and ages of all employees at the facility who were and who were not selected for the layoff. If, however, the employer must eliminate 15 jobs and only considers employees in its accounting department (and not bookkeeping or sales) , then the accounting department is the decisional unit, and the employer has to disclose the title and ages of all employees in the accounting department whose positions were and were not selected for elimination.

The particular circumstances of each termination program determine whether the decisional unit is the entire company, a division, a department, employees reporting to a particular manager, or workers in a specific job classification.

- eligibility factors for the program;
- the **time limits** applicable to the program;
- the **job titles and ages of all individuals who are eligible** or who were selected for the program (the use of age bands broader than one year, such as "age 40-50" does not satisfy this requirement) and the **ages of all individuals in the same job classifications or organizational unit who are not eligible** or who were not selected.

See Appendix B for an example of an agreement issued to employees being laid off or terminated pursuant to a group exit incentive program.

V. Conclusion

Although most signed waivers are enforceable if they meet certain contract principles and statutory requirements, an employer **cannot lawfully** limit an employee's right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC or prevent an employee from filing a charge of discrimination with the agency. An employer also cannot lawfully require an employee to return the money or benefits it gave you in exchange for waving your rights if the employee does file a charge.

4. Constangy Memo –
How to Determine Decisional Unit(s) for OWBPA

Determining the Decisional Unit in Compliance with ADEA Waivers Under the Older Workers Benefit Protection Act

The Age Discrimination in Employment Act (ADEA) and the Older Workers Benefit Protection Act (OWBPA) provide that:

If a waiver of employment claims is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the waiver will not be considered knowing and voluntary unless at a minimum, the employer informs the individuals in writing of the following:

(1) 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

(2) 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.

The required information must be given to each person in the decisional unit who is asked to sign a waiver agreement.

The Decisional Unit

The terms "class," "unit," or "group" and "job classification or organizational unit" refer to examples of categories or groupings of employees affected by a program within an employer's particular organizational structure. The terms are not meant to be an exclusive list of characterizations of an employer's organization.

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. **A "decisional unit" is that portion of the employer's organizational structure from which the employer chose the persons who are being terminated and offered consideration for signing a waiver and those who are not being terminated at that time. The term "decisional unit" has been developed to reflect the process by which an employer chose certain employees for termination and did not select others.**

When identifying the decisional unit, the employer acts on a case-by-case basis, and thus the determination of the appropriate class, unit, or group, and job classification or organizational unit also must be made on a case-by-case basis.

In some cases, a subgroup of a facility's work force may be the decisional unit. In other situations, it may be appropriate for the decisional unit to comprise an entire facility. However, as the decisional unit is typically no broader than the facility, in general the disclosure need be no broader than the facility. “Facility” generally refers to place or location.

Often, an employer is attempting to reduce its workforce at a particular facility in an effort to eliminate what it deems to be excessive overhead, expenses, or costs from its organization at that facility. If the employer's goal is the reduction of its workforce at a particular facility and that employer undertakes a decision-making process by which certain employees of the facility are selected for a program, and others are not selected for a program, then that facility generally will be the decisional unit for purposes of the notification required by the OWBPA.

However, if an employer seeks to terminate employees by considering a particular portion or subgroup of its operations at a specific facility, then that subgroup or portion of the workforce at that facility will be considered the decisional unit.

Likewise, if the employer analyzes its operations at several facilities, specifically considers and compares profitability, seniority rosters, or similar factors at differing facilities, and determines to focus its workforce reduction at a particular facility, then by the nature of that employer's decision-making process the decisional unit would include all considered facilities and not just the facility selected for the reductions.

The following examples may be helpful in determining the appropriate decisional unit. Involuntary reductions in force typically are structured along one or more of the following lines:

(A) Facility-wide: Ten percent of the employees in the Newtown facility will be terminated within the next ten days;

(B) Account-wide: Fifteen of the employees working on the ABC Company Account will be terminated in December;

(C) Department-wide: One-half of the workers in the Telemarketing Department of the Sales Division will be terminated in December;

(D) Reporting: Ten percent of the employees that report to the Vice President for Sales, wherever the employees are located, will be terminated immediately;

(E) Job Category: Ten percent of all accountants, wherever the employees are located, will be terminated next week.

In the examples above, the decisional units are, respectively:

(A) The Newtown facility;
(B) The ABC Company Account;
(C) The Telemarketing Department;
(D) All employees reporting to the Vice President for Sales; and
(E) All accountants.

While the particular circumstances of each termination program will determine the decisional unit, the following examples also may assist in determining when the decisional unit is other than the entire facility.

(A) A number of small facilities with interrelated functions and employees in a specific geographic area may comprise a single decisional unit;

(B) If a company utilizes personnel for a common function at more than one facility, the decisional unit for that function (i.e., accounting) may be broader than the one facility;

(C) A large facility with several distinct functions may comprise a number of decisional units; for example, if a single facility has distinct internal functions with no employee overlap (i.e., sales, accounting, human resources), and the leadership of each such function is making the decision as to which employees within that function are being terminated, then smaller decisional units limited to each of the affected functions may be appropriate.

Higher level review of termination decisions generally will not change the size of the decisional unit unless the reviewing process alters its scope. For example, review by the Human Resources Department to monitor compliance with discrimination laws does not affect the decisional unit. Similarly, when a regional manager in charge of more than one facility reviews the termination decisions regarding one of those facilities, the review does not alter the decisional unit, which remains the one facility under consideration.

However, if the regional manager in the course of review determines that persons in other facilities should also be considered for termination, the decisional unit becomes the population of all facilities considered. Further, if, for example, the regional manager and his three immediate subordinates jointly review the termination decisions, taking into account more than one facility, the decisional unit becomes the populations of all facilities considered.

If the employees being terminated are selected from a subset of a decisional unit, the employer must still disclose information for the entire population of the decisional unit. For example, if the employer decides that a 10% RIF in the Accounting Department will come from the accountants whose performance is in the bottom one-third of the Department, the employer still must disclose information for all employees in the Accounting Department, even those who are the highest rated.

An involuntary termination program in a decisional unit may take place in successive increments over a period of time. Special rules apply to this situation. Specifically, information supplied with regard to the involuntary termination program should be cumulative, so that later terminees are provided ages and job titles or job categories, as appropriate, for all persons in the decisional unit at the beginning of the program and all persons terminated to date. There is no duty to supplement the information given to earlier terminees.

5. Sample Reduction in Force Selection Criteria Matrix - Using Seniority

The following criteria will be used in ranking employees within the same or similar jobs, with a maximum point rating as indicated:

1. Past Performance

Supervisors will be expected to look at performance, including performance evaluations, during the last two years (or less in the case of employees with less service). **Weighting = 40%.**

a. Section III of Employee Performance Evaluation: Departmental Performance Expectations - Indicate average score for this section for evaluations conducted the past two years:

   Rating Scale:
   - Average score <1 = 5 points
   - Average score from 1.1 to 1.9 = 10 points
   - Average score from 2.0 to 2.9 = 15 points
   - Average score from 3.0 to 4.0 = 20 points

2. Special Skills, Experience or Other Qualifications

This includes any special training, education, expertise or other qualifications which the supervisor believes might be important in performing jobs after a reorganization. **Weighting = 15%**

Provide specific details regarding licenses, credentials, degrees, special skills or experience:

_____

_____

_____

Rating Scale for this section:
- One of the items listed above = 5 points
- Two of the items listed above = 10 points
- Three of the items listed above = 15 points

3. Current Knowledge

With respect to the duties of the post layoff position - this factor looks at the employee's current knowledge and understanding of the duties to be performed by the post layoff position. It takes

into consideration the transferability of an employee's knowledge, skills, and abilities for current and future operations. **Weighting = 15%.**
Provide specific details regarding the employee's current knowledge and transferability of that knowledge for future operations:

_____
_____
_____

Rating Scale for this section:

- Lacks sufficient knowledge = 5 points
- Positioned for growth = 10 points
- Capable of assuming additional duties immediately = 15 points

4. Prior Discipline

Consider history of prior disciplinary actions. **Weighting = 15%.**

Provide specific details regarding any disciplinary actions, both verbal and in writing:

_____
_____
_____

Rating Scale for this section:

- Greater than one disciplinary action in the past seven years = 0 points
- One disciplinary action in the past seven years = 5 points
- No history of disciplinary action in the past seven years = 15 points

5. Teamwork

All employees are expected to exhibit a courteous, conscientious and businesslike manner in the workplace, functioning as a member of a team and supporting their coworkers at all times. **Weighting = 10%.**

Rating Scale for this section:

- Refuses requests to assist others = 0 points
- Adheres to own job responsibilities, functions as a solitary worker instead as a member of a team = 5 points
- Consistently performs job responsibilities in a collaborative manner and proactively seeks opportunities to assist co-workers when appropriate, setting an example of cooperation = 15 points

6) Length of Service

Staff members will be credited for their seniority with the organization. Seniority is defined as the length of continuous service with the organization since the most recent employment date. **Weighting = 5%.**

Rating Scale for this section:

- Less than one year = 0 points
- One year or more but less than 7 years = 5 points
- Seven or more years = 15 points

Summary of Points Attained

1) Past Performance _____ points
2) Special Skills, Experience or Other Qualifications _____ points
3) Current Knowledge _____ points
4) Prior Discipline _____ points
5) Teamwork _____ points
6) Length of Service _____ points

Total: _____ points

6. Sample Reduction in Force Selection Criteria Matrix - Without Seniority

Designated Supervisors in affected areas will work with Human Resources to conduct an evaluation and ranking of employees. The following criteria will be used in ranking employees within the same or similar jobs, with a maximum point rating as indicated:

1. Past Performance

Supervisors will be expected to look at performance, including performance evaluations, during the last two years (or less in the case of employees with less service). **Weighting = 40%.**

Employee Performance Evaluation: Performance Expectations
Indicate average score for evaluations conducted the past two years: _____

Rating Scale:

- Average score <1 = 5 points
- Average score from 1.1 to 1.9 = 10 points
- Average score from 2.0 to 2.9 = 15 points
- Average score from 3.0 to 4.0 = 20 points

2. Special Skills, Experience or Other Qualifications:

This includes any special training, education, expertise or other qualifications which the supervisor believes might be important in performing jobs after a reorganization. **Weighting = 15%**

Provide specific details regarding licenses, credentials, degrees, special skills or experience:

_____

_____

_____

Rating Scale for this section:

- One of the items listed above = 5 points
- Two of the items listed above = 10 points
- Three of the items listed above = 15 points

3. Current Knowledge

With respect to the duties of the post layoff position - this factor looks at the employee's current knowledge and understanding of the duties to be performed by the post layoff position. It takes into consideration the transferability of an employee's knowledge, skills, and abilities for current and future operations. **Weighting = 15%.**

Provide specific details regarding the employee's current knowledge and transferability of that knowledge for future operations:

_____

_____

_____

Rating Scale for this section:

- Lacks sufficient knowledge = 5 points
- Positioned for growth = 10 points
- Capable of assuming additional duties immediately = 15 points

4. Prior Discipline

Consider history of prior disciplinary actions. **Weighting = 15%.**

Provide specific details regarding any disciplinary actions, both verbal and in writing:

_____

_____

_____

Rating Scale for this section:

- Greater than one disciplinary action in the past seven years = 0 points
- One disciplinary action in the past seven years = 5 points
- No history of disciplinary action in the past seven years = 15 points

5. Teamwork

All employees are expected to exhibit a courteous, conscientious and businesslike manner in the workplace, functioning as a member of a team and supporting their coworkers at all times. **Weighting = 15%.**

Rating Scale for this section:

- Refuses requests to assist others = 0 points
- Adheres to own job responsibilities, functions as a solitary worker instead as a member of a team = 5 points

- Consistently performs job responsibilities in a collaborative manner and proactively seeks opportunities to assist co-workers when appropriate, setting an example of cooperation = 15 points

Seniority will be the determining criteria where employees are equally qualified in regard to the above criteria. Staff members having the least seniority will be eliminated first. Seniority is defined as the length of continuous service with the organization since the most recent employment date.

Summary of Points Attained

1) Past Performance _____ points
2) Special Skills, Experience or Other Qualifications _____ points
3) Current Knowledge _____ points
4) Prior Discipline _____ points
5) Teamwork _____ points

Total: _____ points

7. Sample Separation Agreement (Florida)

Florida Separation Agreement
Multiple Employees Over 40

Employment Separation Agreement, Waiver and Release

THIS EMPLOYMENT SEPARATION AGREEMENT, WAIVER AND RELEASE (hereinafter "Agreement") is made and entered into between _____ and its subsidiaries, affiliates, directors, officers, employees, representatives and agents (collectively referred to herein as the "Employer"), and, **[INSERT FIRST NAME LAST NAME],** his/her heirs, assigns, executors and administrators (collectively referred to herein as "Employee").

WHEREAS, Employer and Employee desire to amicably end their employment relationship and fully and finally settle all existing or potential claims and disputes between them, whether known or unknown as of this date, the parties agree as follows:

1. **Separation From Employment.** Employee's employment relationship with the Employer terminates effective **DATE** ("Termination Date").

2. **Obligations of the Employer.** In consideration of Employee's agreement to the terms herein, the Employer shall provide to Employee the following severance benefits to which Employee is not otherwise entitled:

   Employee will receive a severance benefit equal to **[INSERT AMOUNT SEVERANCE]** weeks of Employee's base salary, less applicable payroll deductions, applicable payroll taxes and authorized after-tax deductions. The severance payment will be paid in a lump sum within fifteen (15) days after the effective date of this Agreement.

3. **Obligations of Employee**. In consideration of the foregoing severance arrangements provided by the Employer, Employee agrees as follows:

   (a) Employee will assist in the transition of duties and will be reasonably available to answer questions during the Post-Termination Period.

   (b) Employee waives and releases the Employer of and from any claims, demands, damages, lawsuits, obligations, promises, and causes of action, both known and unknown, in law or in equity, of any kind whatsoever,

including, but not limited to, all matters relating to or arising out of Employee's employment with the Employer, compensation by the Employer, or separation of employment from the Employer. This Waiver and Release covers any suits under Title VII of the Civil Rights Act of 1964, as amended; the Rehabilitation Act of 1973, as amended; the Equal Pay Act of 1963, as amended; the Age Discrimination in Employment Act of 1967, as amended; the Older Workers Benefit Protection Act; the Americans with Disabilities Act; the Civil Rights Act of 1991; Section 1981 of the Civil Rights Act of 1866; the Fair Credit Reporting Act; the Florida Civil Rights Act, as amended; and further covers administrative charges, actions and suits under the National Labor Relations Act, as amended; the Fair Labor Standards Act of 1938, as amended; the Employee Retirement Income Security Act of 1974, as amended; the Family and Medical Leave Act; and any other federal or state law or municipal ordinance, including any lawsuits founded in tort (including negligence), contract (oral, written or implied) or any other common law or equitable basis of action, up to and including the effective date of this Agreement. Employee acknowledges that this Agreement is intended to constitute a full and final settlement and bar to all claims of any kind, known or unknown, which Employee may have against the Employer

This Agreement does not waive or release any claims based on acts or omissions that occur after the date of signing this Agreement; any claim for unemployment compensation benefits; or any claim for vested benefits under an Employer retirement plan. Employee understands that nothing contained in this Agreement limits Employee's ability to file a charge or complaint with the Equal Employment Opportunity Commission, or other government agency ("Government Agencies"). Employee further understands that this Agreement does not limit Employee's ability to communicate with such Government Agencies or otherwise participate in any investigation or proceeding that may be conducted by such Government Agency, including providing documents or other information, without notice to the Company. This Agreement does not limit Employee's right to receive an award from a Government Agency for information provided to such Government Agency.

(c) Employee shall not disclose, either directly or indirectly, any information whatsoever regarding any of the terms or the existence of this Agreement or of any other claim Employee may have against the Employer, to any person or organization, including but not limited to members of the press and media, present and former employees of the Employer, companies who do business with the Employer, or other members of the public. The only exceptions to Employee's promise of confidentiality herein is that Employee may reveal such terms of this Agreement as are necessary to comply with a request made by the Internal Revenue Service, as otherwise compelled by a court or agency of competent jurisdiction, as allowed and/or required by law, or as necessary

to comply with requests from Employee's accountants or attorneys for legitimate business purposes.

(d) Employee shall refrain from making any written or oral statement or taking any action, directly or indirectly, which Employee knows or reasonably should know to be disparaging or negative concerning the Employer except as allowed or required by law. Employee also shall refrain from suggesting to anyone that any written or oral statements be made which Employee knows or reasonably should know to be disparaging or negative concerning the Employer, or from urging or influencing any person to make any such statement. This provision shall include, but not be limited to, the requirement that Employee refrain from expressing any disparaging or negative opinions concerning the Employer, Employee's separation from the Employer, any of the Employer's officers, directors, or employees, or any other matters relative to the Employer's reputation as an employer. Employee's promises in this subsection, however, shall not apply to any judicial or administrative proceeding in which Employee is a party or has been subpoenaed to testify under oath by a government agency or by any third party.

4. **Non-Admission**. Neither this Agreement, nor anything contained herein, is to be construed as an admission by the Employer or Employee or as evidence of any liability, wrongdoing or unlawful conduct whatsoever.

5. **Severability**. If any provision of this Agreement is invalidated by a court of competent jurisdiction, then all of the remaining provisions of this Agreement shall continue unabated and in full force and effect.

6. **Entire Agreement**. This Agreement contains the entire understanding and agreement between the parties and shall not be modified or suspended except upon express written consent of the parties to this Agreement. Employee represents and acknowledges that in executing this Agreement Employee does not rely and has not relied upon any representation or statement made by the Employer or its agents, representatives or attorneys which is not set forth in this Agreement.

7. **Supersedes Past Agreements**. Except as expressly provided herein, this Agreement supersedes and renders null and void any previous employment agreements or contracts, whether written or oral, between Employee and the Employer; except as identified in paragraph **7** of this Agreement.

8. **Restrictive Covenants.** Employee agrees that in the event that Employee has entered into a non-compete, confidentiality or non-disclosure agreement at any time during employment, such agreement will remain in full force and effect ("Existing Agreements").

Employee further agrees, as a condition of receiving the severance benefit described in this Agreement, Employee will not, directly or indirectly, individually or by or through any other corporate of business entity: (a) misappropriate, disclose, communicate, or otherwise use any Proprietary or Confidential Information belonging to Employer to any other person, firm, corporation, association or other entity without the prior written consent of the Employer except as may be required by court order, statute or law; (b) either directly or indirectly, whether personally or as an associate, employee, partner, manager, agent or otherwise on behalf of any other person: (i) solicit, sell to, call upon or otherwise engage in any contact with any client or customer or any person who was identified as a prospective client or customer of Employer during the period of Employee's employment by Employer for the purpose of soliciting, selling or providing to such person any goods or services in competition with Employer: (ii) hire or engage for employment or services, or solicit to do so, any current or former employee, leased employee, agent, representative or other person providing services to or for Employer for six (6) months after the termination of any such person's relationship with the company; (iii) at any place within the United States, engage in any business activities which compete with the business of Employer; (iv) aid, abet, recruit, solicit, train or assist any other person to undertake any of the activities proscribed by any covenant of this Agreement.

9. **Governing Law**. This Agreement shall be governed by the laws of the State of Florida.

10. **Opportunity to Consider and Confer**. Employer has advised Employee to consult with an attorney prior to executing this Agreement, and Employee acknowledges having been given a period of at least forty-five (45) days within which to consider this Agreement, regardless of whether the terms of the Agreement have been modified during the forty-five (45) day period. If Employee has signed this Agreement prior to the forty-five (45) day period, it is because Employee freely chose to do so. Employee and the Employer acknowledge that each has had the opportunity to read, study, consider, and deliberate upon this Agreement, have been given the opportunity to consult with counsel or an otherwise competent representative, and both parties fully understand and are in complete agreement with all of the terms of this Agreement.

11. **Disclosure.** Employees age forty (40) and above are being given as part of this Agreement the following information as required by the Older Worker Benefit Protection Act: (i) description of the group of individuals to whom the Employer is offering separation benefits in exchange for a release of claims; (ii) eligibility factors for inclusion in that group; (iii) the time limits applicable to the separation benefits offer; (iv) the job titles and ages of all individuals to whom the Employer is offering separation benefits in exchange for a release of claims; and (v) the

ages of all individuals to whom the Employer did not offer separation benefits in exchange for a release of claims but who were in the same job classifications or organizational unit as any individual covered in the group described in (iv). If applicable, this information is provided in Attachment A of this Agreement and is incorporated into this Agreement.

12. **Effective Date**. This Agreement may be revoked by Employee for a period of seven (7) days following the execution of the Agreement, and the Agreement shall not become effective or enforceable until the revocation period has expired. To revoke this Agreement, Employee must send a written notice to _____ no later than the eighth (8^{th}) day after Employee's signing of the Agreement.

13. **Termination and Recovery of Benefits and Remedies for Breach.**

(a) ADEA. In the event that Employee brings and prevails in an action against the Employer based on an ADEA claim released in Paragraph 3(b), the Employer will be entitled to offset any recovery by the amounts paid under this Agreement or the amount recovered by Employee, whichever is less. In the event that the Employer prevails in such an action, the Employer will be entitled to all remedies authorized by applicable law.

(b) All Other Claims. In the event that Employee brings an action against the Employer based on any other claim released in Paragraph 3(b), the Employer may, at its option, and as applicable (i) stop making payments that would otherwise have been due under this Agreement; (ii) demand the return of any payments that have been made under this Agreement; (iii) plead this Agreement in bar to any such action; (iv) seek any and all remedies available, including but not limited to injunctive relief and monetary damages, costs and reasonable attorneys' fees.

(c) Breach by the Employer. In the event that the Employer breaches this Agreement, Employee will be entitled to bring an action for breach of this Agreement but not for any claims released by Paragraph 3(b). In the event that Employee prevails in such an action, Employee will be entitled to recover (as appropriate and applicable) monetary damages, injunctive relief, costs and reasonable attorneys' fees.

IN WITNESS WHEREOF, and intending to be legally bound, the Employer by its authorized representative, and Employee, execute this Agreement by signing below voluntarily and with full knowledge of the significance of all its provisions.

PLEASE READ CAREFULLY. THIS EMPLOYMENT SEPARATION AGREEMENT, WAIVER AND RELEASE INCLUDES A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS.

Executed at _____, this _____day of _____, 20__.

_____ _____

Witness as to Employee **EMPLOYEE SIGNATURE**

_____ _____

Print Name Print Name

==========

Executed at _____this ____day of _____, 20__.

Employer

By_____

8. Sample Older Workers Benefit Protection Act Memo

This memo only needs to be provided to employees over 40 years old when more than one employee is being laid off.

MEMORANDUM

_____ [Company] is undergoing a reduction in its workforce. As an employee within the selected decisional unit affected by the reduction, you are legally entitled to the following information concerning the reduction in force:

(a) The decisional unit is the _____.

(b) All persons who are being separated in the reduction in force are selected for the program.

(c) All persons who are being offered consideration under a waiver agreement must sign the agreement and return it to the Human Resources Department within 45 days after receiving the waiver. Once the signed waiver is returned to the Human Resources Department, the employee has 7 days to revoke the waiver agreement.

(d) The criteria used to determine positions to eliminate include:

- Retention of current levels of quality, productivity and efficiency
- Elimination of any vacant positions which are no longer required at this time
- Elimination of a specific position which is no longer required at this time
- In the case of several individuals holding the same position, the decision was based on [length of service (the position of the individual with the shorter length of service was eliminated)] [an evaluation of several factors to determine the most appropriate staffing in order to best perform the mission of the organization after the reduction in force]
- A focus on management level positions and overall extent of responsibility

(e) The following is a listing of the ages and job titles of persons in the _____[Decisional Unit] who were selected for separation and the offer of consideration for signing a waiver:

- 45, 46, 50, 52 - Adm Assistant

- 50, 36 - Customer Service Rep

(f) The following is a listing of the ages and job titles of persons in the _____[Decisional Unit] who were not selected for separation and the offer of consideration for signing a waiver:

- 49,31 - Adm Assistant
- 62, 28 - Customer Service Rep

9. Sample Older Workers Benefit Protection Act Memo (Hospital)

MEMORANDUM

_____ Hospital is undergoing a reduction in its workforce. As an employee within the selected decisional unit affected by the reduction, you are legally entitled to the following information concerning the reduction in force:

a) The decisional unit is the Radiation Oncology Department

b) All persons who are being separated in the reduction in force are selected for the program.

c) All persons who are being offered consideration under a waiver agreement must sign the agreement and return it to the Human Resources Department within 45 days after receiving the waiver. Once the signed waiver is returned to the Human Resources Department, the employee has 7 days to revoke the waiver agreement.

d) The criteria used to determine positions to eliminate include:

- Retention of current levels of quality and direct patient care staffing
- Elimination of any vacant positions which are no longer required at this time
- Elimination of a specific position which is no longer required at this time
- In the case of several individuals holding the same position, the decision was based on [length of service (the position of the individual with the shorter length of service was eliminated)] [an evaluation of several factors to determine the most appropriate staffing in order to best perform the mission of the organization after the reduction in force]
- A focus on management level positions and overall extent of responsibility

e) The following is a listing of the ages and job titles of persons in the Radiation Oncology Department who were selected for separation and the offer of consideration for signing a waiver:

- 35 Dosimetrist

f) The following is a listing of the ages and job titles of persons in the Radiation Oncology Department who were not selected for separation and the offer of consideration for signing a waiver:

- 49 Director
- 35 Dosimetrist
- 51 Director of Medical Physics
- 58 Registered Nurse
- 55 Radiation Therapist,Supervisor
- 51 Dosimetrist
- 30 Radiation Therapist
- 40 Supervisor, Oncology Patient A
- 26 Radiation Therapist
- 34 Patient Access Representative
- 28 Radiation Therapist
- 19 Patient Access Representative
- 31 Registered Nurse
- 23 Radiation Therapist

10. WARN Act Notice Introduction

The federal Worker Adjustment and Retraining Notification Act (WARN) requires for profit and not-for-profit employers with 100 or more employees (generally not counting those who have worked less than six months in the last 12 months and those who work an average of less than 20 hours a week) to provide at least 60 calendar days advance written notice of a plant closing and mass layoff affecting 50 or more employees at a single site of employment. WARN makes certain exceptions to the requirements when layoffs occur due to unforeseeable business circumstances, faltering companies, and natural disasters.

Employees entitled to notice under WARN include managers and supervisors, as well as hourly and salaried workers. WARN requires that notice also be given to employees' representatives, the local chief elected official, and the state dislocated worker unit.

These sample WARN notices are designed to be used by employers covered by the federal WARN Act. Employers in certain states may also be subject to state versions of the WARN Act, often referred to as mini-WARN Acts. State WARN Acts may cover employers not covered by the federal WARN Act; or may apply to plant closing or layoffs that would not be covered by the federal WARN Act; or contain different notice requirements than the federal WARN Act.

U.S. Department of Labor
Employment and Training Administration
Fact Sheet

The Worker Adjustment and Retraining Notification Act

A Guide to Advance Notice of Closings and Layoffs

The Worker Adjustment and Retraining Notification Act **(WARN)** was enacted on August 4, 1988 and became effective on February 4, 1989.

General Provisions

WARN offers protection to workers, their families and communities by requiring employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs. This notice must be provided to either affected workers or their representatives (e.g., a labor union); to the State dislocated worker unit; and to the appropriate unit of local government.

Employer Coverage

In general, employers are covered by **WARN** if they have 100 or more employees, not counting 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. Private, for-profit employers and private, nonprofit employers are covered, as are public and quasi-public entities which operate in a commercial context and are separately organized from the regular government. Regular Federal, State, and local government entities which provide public services are not covered.

Employee Coverage

Employees entitled to notice under **WARN** include hourly and salaried workers, as well as managerial and supervisory employees. Business partners are not entitled to notice.

What Triggers Notice

Plant Closing: A covered employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an employment loss (as defined later) for 50 or more employees during any 30-day period. This does not count employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to

notice (discussed later).

Mass Layoff: A covered employer must give notice if there is to be a mass layoff which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50499 employees if they make up at least 33% of the employer's active workforce. Again, this does not count employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice (discussed later).

An employer also must give notice if the number of employment losses which occur during a 30-day period fails to meet the threshold requirements of a plant closing or mass layoff, but the number of employment losses for 2 or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period, of either a plant closing or mass layoff. Job losses within any 90-day period will count together toward **WARN** threshold levels, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

Sale of Businesses

In a situation involving the sale of part or all of a business, the following requirements apply. (1) In each situation, there is always an employer responsible for giving notice. (2) If the sale by a covered employer results in a covered plant closing or mass layoff, the required parties (discussed later) must receive at least 60 days notice. (3) The seller is responsible for providing notice of any covered plant closing or mass layoff which occurs up to and including the date/time of the sale. (4) The buyer is responsible for providing notice of any covered plant closing or mass layoff which occurs after the date/time of the sale. (5) No notice is required if the sale does not result in a covered plant closing or mass layoff. (6) Employees of the seller (other than employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week) on the date/time of the sale become, for purposes of **WARN,** employees of the buyer immediately following the sale. This provision preserves the notice rights of the employees of a business that has been sold.

Employment Loss

The term "employment loss" means:

(1) An employment termination, other than a discharge for cause, voluntary departure, or retirement;

(2) a layoff exceeding 6 months; or

(3) a reduction in an employee's hours of work of more than 50% in each month of any

6-month period.

Exceptions: An employee who refuses a transfer to a different employment site within reasonable commuting distance does not experience an employment loss. An employee who accepts a transfer outside this distance within 30 days after it is offered or within 30 days after the plant closing or mass layoff, whichever is later, does not experience an employment loss. In both cases, the transfer offer must be made before the closing or layoff, there must be no more than a 6 month break in employment, and the new job must not be deemed a constructive discharge. These transfer exceptions from the "employment loss" definition apply only if the closing or layoff results from the relocation or consolidation of part or all of the employer's business.

Exemptions

An employer does not need to give notice if a plant closing is the closing of a temporary facility, or if the closing or mass layoff is the result of the completion of a particular project or undertaking. This exemption applies only if the workers were hired with the understanding that their employment was limited to the duration of the facility, project or undertaking. An employer cannot label an ongoing project "temporary" in order to evade its obligations under **WARN.**

An employer does not need to provide notice to strikers or to workers who are part of the bargaining unit(s) which are involved in the labor negotiations that led to a lockout when the strike or lockout is equivalent to a plant closing or mass layoff Non-striking employees who experience an employment loss as a direct or indirect result of a strike and workers who are not part of the bargaining unit(s) which are involved in the labor negotiations that led to a lockout are still entitled to notice.

An employer does not need to give notice when permanently replacing a person who is an "economic striker" as defined under the National Labor Relations Act.

Who Must Receive Notice

The employer must give written notice to the chief elected officer of the exclusive representative(s) or bargaining agency(s) of affected employees and to unrepresented individual workers who may reasonably be expected to experience an employment loss. This includes employees who may lose their employment due to "bumping," or displacement by other workers, to the extent that the employer can identify those employees when notice is given. If an employer cannot identify employees who may lose their jobs through bumping procedures, the employer must provide notice to the incumbents in the jobs which are being eliminated. Employees who have worked less than 6 months in the last 12 months and employees who work an average of less than 20 hours a week are due notice, even though they are not counted when determining the trigger levels.

The employer must also provide notice to the State dislocated worker unit and to the

chief elected official of the unit of local government in which the employment site is located.

Notification Period

With three exceptions, notice must be timed to reach the required parties at least 60 days before a closing or layoff. When the individual employment separations for a closing or layoff occur on more than one day, the notices are due to the representative(s), State dislocated worker unit and local government at least 60 days before each separation. If the workers are not represented, each worker's notice is due at least 60 days before that worker's separation.

The exceptions to 60-day notice are:

(1) Faltering company. This exception, to be narrowly construed, covers situations where a company has sought new capital or business in order to stay open and where giving notice would ruin the opportunity to get the new capital or business, and applies only to plant closings;

(2) unforeseeable business circumstances. This exception applies to closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required; and

(3) Natural disaster. This applies where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm.

If an employer provides less than 60 days advance notice of a closing or layoff and relies on one of these three exceptions, the employer bears the burden of proof that the conditions for the exception have been met. The employer also must give as much notice as is practicable. When the notices are given, they must include a brief statement of the reason for reducing the notice period in addition to the items required in notices.

Form and Content of Notice

No particular form of notice is required. However, all notices must be in writing. Any reasonable method of delivery designed to ensure receipt 60 days before a closing or layoff is acceptable.

Notice must be specific. Notice may be given conditionally upon the occurrence or non-occurrence of an event only when the event is definite and its occurrence or nonoccurrence will result in a covered employment action less than 60 days after the event.

The content of the notices to the required parties is listed in section 639.7 of the **WARN** final regulations. Additional notice is required when the date(s) or 14-day period(s) for a planned plant closing or mass layoff are extended beyond the date(s) or

14-day period(s) announced in the original notice.

Record

No particular form of record is required. The information employers will use to determine whether, to whom, and when they must give notice is information that employers usually keep in ordinary business practices and in complying with other laws and regulations.

Penalties

An employer who violates the **WARN** provisions by ordering a plant closing or mass layoff without providing appropriate notice is liable to each aggrieved employee for an amount including back pay and benefits for the period of violation, up to 60 days. The employer's liability may be reduced by such items as wages paid by the employer to the employee during the period of the violation and voluntary and unconditional payments made by the employer to the employee.

An employer who fails to provide notice as required to a unit of local government is subject to a civil penalty not to exceed $500 for each day of violation. This penalty may be avoided if the employer satisfies the liability to each aggrieved employee within 3 weeks after the closing or layoff is ordered by the employer.

Enforcement

Enforcement of **WARN** requirements is through the United States district courts. Workers, representatives of employees and units of local government may bring individual or class action suits. In any suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

Information

Specific requirements of the Worker Adjustment and Retraining Notification Act may be found in the Act itself, Public Law 100-379 (29 U.S.C. 2101, et seq.) The Department of Labor published final regulations on April 20, 1989 in the Federal Register (Vol. 54, No. 75). The regulations appear at 20 CFR Part 639.

General questions on the regulations may be addressed to:

WARN Act Information Team
U.S. Department of Labor
Employment and Training Administration
Office of Policy Development and Research
Room N-5641
200 Constitution Avenue, N.W.
Washington, D.C. 20210

(202) 693-3079
E-mail: Wam.inquiriesgdol.gov

The Department of Labor, since it has no administrative or enforcement responsibility under WARN, cannot provide specific advice or guidance with respect to individual situations.

This is one of a series of fact sheets highlighting U.S. Department of Labor programs. It is intended as a general description only and does not carry the force of legal opinion.

11. Sample WARN Act Notices to Non-Union Employees

Notice to Individual Employees of Plant Closing

Dear _____:

I regret to inform you that, beginning on April 30, _____, the XYZ Corporation will order the closing of its entire plant located at _____ Street in the City of _____. According to the best available information, your own position as a [_____] will be permanently terminated between May ___ and May ___, _____. [Maximum 14 day time period between start date and end date] Since there will be no jobs remaining at the facility, the XYZ bumping policy will not apply to this situation. The notice provided herewith is intended to satisfy the requirements of the Federal WARN Act (Public Law 100-379).

For further information or assistance, please contact Mr. _____ in the Human Resources Office (999-9999).

Sincerely,

_____

Plant Manager

Notice to Individual Employees of Layoff

Dear _____:

I regret to inform you that you are to be included in a layoff which will be ordered by the XYZ Corporation on April __, ____. According to the best available information, the layoff of your position will commence between April __ and May __, ____. [Maximum 14 day time period between start date and end date] This layoff is expected to be temporary and is expected to last at least six months. Bumping rights [are][are not] applicable. The notice provided herewith is intended to satisfy the requirements of the Federal WARN Act (Public Law 100-379).

For further information or assistance, please contact _____ in the Human Resources Office (999-9999).

Sincerely,

_____

Plant Manager

Notice to Employee of Layoff of Less Than 6 Months

Dear _____:

I regret to inform you that you that, effective March __, ____, you are to be included in a layoff being ordered by the XYZ Company. Since this layoff is expected to last less than 6 months, advance notice is not required under the Federal WARN Act (Public Law 100-379).

For further information or assistance, please contact Mr. _____ in the Human Resources Office (999-9999).

Sincerely,

_____

Plant Manager

12. Sample WARN Act Notices to Union

Notice to Union of Plant Closing

Dear Mr. _____:

I regret to inform you that you that, beginning on April __, ____, the XYZ Corporation will order the closing of its plant located at _____Street in the City of _____. This will be a permanent closing of the entire plant and, according to the best available information, will result in a permanent employment loss for the following positions represented by your local on the dates indicated (names attached):

- April __-May __, ____:

  Tool & Die Makers B & C
  Machinists
  Welders
  Plastics Technicians
  Mechanical Workers
  Glass Workers

- May __-__, ____:

  Punch Press Operators – Heavy
  Punch Press Operators – Light
  Radial Press Operators
  Drill Press Operators
  Fork Lift Operator

- May __-June __, ____:

  Machine Operators

- June __-__, ____:

  Tool & Die Makers B & C
  Machinists
  Welders
  Plastics Technicians
  Glass Workers
  Punch Press Operators – Heavy
  Punch Press Operators – Light
  Radial Press Operator

Drill Press Operators
Fork Lift Operator
Machine Operators
Light Assemblers

The notice provided herewith is intended to satisfy the requirements of the Federal WARN Act (Public Law 100-379). For further information or assistance, please contact _____, Human Resources Manager, _____ Plant, at (999) 999-9999.

Sincerely,

_____
Plant Manager

Notice to Union of Mass Layoff

Dear Mr. _____:

I regret to inform you that you that certain members of the bargaining unit represented by your local are to be included in a layoff which will be ordered by the XYZ Corporation between April __ and May __, ____, [Maximum 14 day time period between start date and end date]at its plant located at _____ Street in the City of _____. This layoff is currently expected to be temporary but is expected to last at least 6 months.

According to the best available information, this will result in a temporary employment loss for the following positions represented by your local (names attached):

Tool & Die Makers B & C
Machinists
Welders
Plastics Technicians
Mechanical Workers
Glass Workers

The notice provided herewith is intended to satisfy the requirements of the Federal WARN Act (Public Law 100-379). For further information or assistance, please contact _____, Human Resources Manager, _____ Plant, XYZ Corporation at (999) 999-9999.

Sincerely,

_____
Plant Manager

Notice to Union of Layoff of Less Than 6 Months

Dear Mr. _____:

I regret to inform you that you that, effective immediately, certain members of the bargaining unit represented by your local are to be included in a layoff which will be ordered by the XYZ Corporation at its plant located at _____ Street in the City of _____. Since this layoff will last less than 6 months, advance notice is not required under the Federal WARN Act (Public Law 100-379).

For further information or assistance, please contact _____, Human Resources Manager, _____ Plant, XYZ Corporation, at (999) 999-9999.

Sincerely,

_____
Plant Manager

13. Sample WARN Act Notices to State Dislocated Worker Unit

Notice to State Dislocated Worker Unit – Mass Layoff

WARN NOTICE

[Date]

TO: _____
Director
Office of Economic Dislocation Services
State of _____

FROM: _____
Plant Manager
XYZ Glass Corporation

In compliance with the Federal WARN Act (Public Law 100-379), this is to notify you that, beginning on April __, ____, the XYZ Glass Corporation will order layoffs at its plant located at _____ Streets in the City of _____. This will result in layoffs for approximately ___ XYZ employees currently employed at that location. According to the best available information, these are expected to be temporary, but at least 6 months in duration.

According to the best available information, the following is the anticipated schedule of employment separations:

- April __-May __, ____: _#_ hourly wage employees in the following job classifications:

  # Tool & Die Makers B & C
  # Machinists
  # Welders
  # Plastics Technicians
  # Maintenance Men
  # Mechanical Inspectors
  # Glass Workers

- May __-__, ____: _#_ hourly wage employees in the following categories:

Punch Press Operators – Heavy
Punch Press Operators – Light
Radial Press Operators
Drill Press Operators
Fork Lift Operator

- May __-June __, ____: _#_ salaried employees in the following categories:

Sales Engineers
R & D Engineers
Buyer
Computer Operator
Lab Technicians
Manager – Employment & Training
Process Technician
Draftsman
Secretaries
Clerk-Typists
Keypunch Operators
Messenger

Local ____ of the _____ Union represents __#__of the affected employees. The president of the local is Mr. _____, [address].

Local ____ of the _____ Union represents __#__of the affected employees. The president of the local is Mr. _____, [address].

Bumping rights do apply to some of these positions. For further information, please contact: _____, Personnel Manager, _____ Plant, at (999) 999-9999.

Optional Notice To State Dislocated Worker Unit – Mass Layoff

WARN NOTICE

[Date]

TO: _____
Director
Office of Economic Dislocation Services
State of _____

FROM: _____
Plant Manager
XYZ Corporation

In compliance with the Federal WARN Act (Public Law 100-379), this is to notify you that, beginning on April __, ____, the XYZ Corporation will order layoffs at its plant located at _____ Street in the City of _____. This will result in layoffs for approximately ___ XYZ employees currently employed at that location. According to the best available information, the first separations will occur between April __ and May __. [Maximum 14 day time period between start date and end date] This will result in layoffs for approximately ___ XYZ employees currently employed at that location. According to the best available information, these are expected to be temporary, but at least 6 months in duration.

The additional information required by the Department of Labor is available at the facility. For further information, please contact: _____, Human Resources Manager, _____ Plant, at (999) 999-9999.

Optional Notice To State Dislocated Worker Unit – Plant Closing

WARN NOTICE

[Date]

TO: _____
Director
Office of Economic Dislocation Services
State of _____

FROM: _____
Plant Manager
XYZ Corporation

In compliance with the Federal WARN Act (Public Law 100-379), this is to notify you that, beginning on April __, ____, the XYZ Corporation will order the closing of its plant located at _____ Street in the City of _____. This will result in layoffs for approximately ___ XYZ employees currently employed at that location. According to the best available information, the first separations will occur between April __ and May __. [Maximum 14 day time period between start date and end date] Ultimately, it will result in an employment loss for approximately ___ XYZ employees currently employed at that location.

The additional information required by the Department of Labor is available at the facility. For further information, please contact: _____, Human Resources Manager, _____ Plant, at (999) 999-9999.

14. Sample WARN Act Notices to Chief Elected Officials

Optional Notice to Local Government – Plant Closing

WARN NOTICE

[Date]

TO: The Honorable _____
Mayor, City of _____, State

FROM: _____
Plant Manager
XYZ Corporation

In compliance with the Federal WARN Act (Public Law 100-379), this is to notify you that, beginning on April __, ____, the XYZ Corporation will order the closing of its plant located at _____ Street in the City of _____. According to the best available information, the first separations will occur between April __ and May __. [Maximum 14 day time period between start date and end date] Ultimately, it will result in an employment loss for approximately ___ XYZ employees currently employed at that location.

The additional WARN information required by the U.S. Department of Labor is available at the facility. For further information, please contact _____, Human Resources Manager, _____ Plant, XYZ Corporation, at (999) 999-9999.

Sincerely,

_____
Plant Manager

Notice to Local Government – Mass Layoff

WARN NOTICE

[Date]

TO: The Honorable _____
Mayor, City of _____, State

FROM: _____
Plant Manager
XYZ Corporation

In compliance with the Federal WARN Act (Public Law 100-379), this is to notify you that, beginning on April __, ____, the XYZ Corporation will order layoffs at its plant located at _____ Street in the City of _____. According to the best available information, the first separations will occur between April __ and May __. [Maximum 14 day time period between start date and end date] This will result in layoffs for approximately ___ XYZ employees currently employed at that location. According to the best available information, these are expected to be temporary, but at least 6 months in duration.

According to the best available information, the following is the anticipated schedule of employment separations:

- April __-May __, ____: _#_ hourly wage employees in the following job classifications:

  # Tool & Die Makers B & C
  # Machinists
  # Welders
  # Plastics Technicians
  # Maintenance Men
  # Mechanical Inspectors
  # Glass Workers

- May __-__, ____: _#_ hourly wage employees in the following categories:

  # Punch Press Operators – Heavy
  # Punch Press Operators – Light
  # Radial Press Operators
  # Drill Press Operators
  # Fork Lift Operator

- May __-June __, ____: _#_ salaried employees in the following categories:

    # Sales Engineers
    # R & D Engineers
    # Buyer
    # Computer Operator
    # Lab Technicians
    # Manager – Employment & Training
    # Process Technician
    # Draftsman
    # Secretaries
    # Clerk-Typists
    # Keypunch Operators
    # Messenger

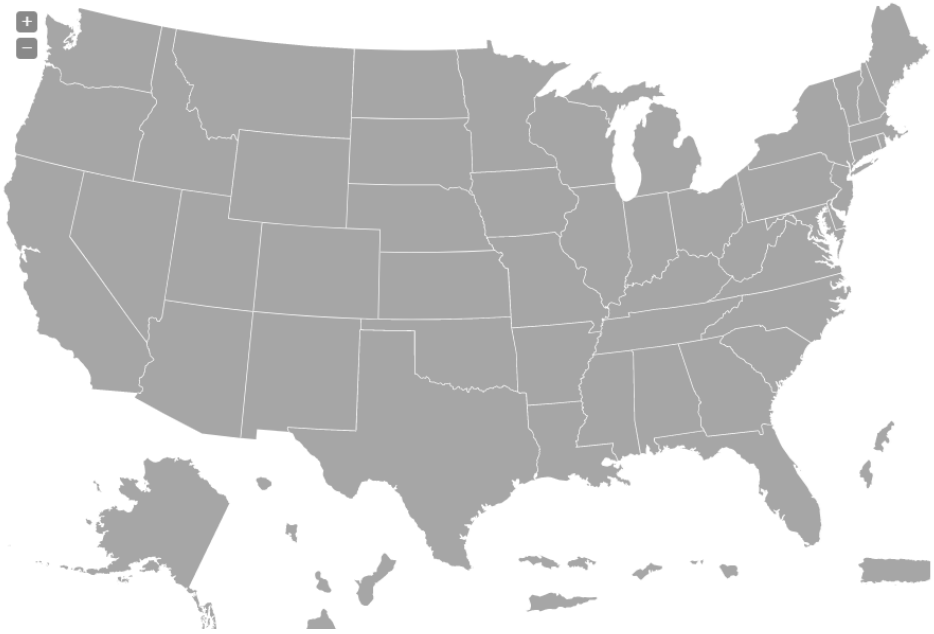
Local ____ of the _____ Union represents __#_of the affected employees. The president of the local is Mr. _____, [address].

Local ____ of the _____ Union represents __#_of the affected employees. The president of the local is Mr. _____, [address].

Bumping rights do apply to some of these positions. For further information, please contact: _____, Human Resources Manager, _____ Plant, at (999) 999-9999.

15. List of State Dislocated Worker Units

Employment and Training Administration
State Rapid Response Coordinators



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Adult & Dislocated Worker Programs
Wisconsin Department of Workforce Development
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16. 409A Analysis & Checklist

Application of IRC 409A To Severance Benefits
409A Checklist

1. Are severance benefits exempt from 409A because of any of the following:

    - The employee has no legally binding right to compensation
    - The employee and employer are disputing the entitlement
    - The payments satisfy the short-term deferral rule
    - The payments qualify for the severance pay exception
    - The payments result from a collective bargained severance arrangement

2. Severance Pay Exception

    Severance pay that is payable only on an involuntary termination (or voluntary termination under a window program lasting not more than 12 months (see Definition of Window Program)) is exempt from Section 409A (26 U.S.C. § 409A) if it meets the following conditions:

    - It is paid by the end of the second year following the year of termination.
    - It does not exceed the lesser of two times:
    - the employee's base salary at the end of the year before the year of termination; or
    - the limit on compensation under a qualified retirement plan for the year of termination ($280,000 for 2019 and $275,000 for 2018).

3. Is Continued medical coverage or medical reimbursement subject to 409A?

4. Are In-Kind benefits subject to 409A?

5. Are Reimbursements subject to 409A?

6. Accelerated Vesting and Payment of Deferred and Equity Compensation

7. Stock Options and Stock Appreciation Rights

17. Script for Layoff Meetings with Employees

Good morning or afternoon, name of employee, The reason we asked you to come speak with us today is that we have some difficult news to deliver. After a review of the current state of the business it has been decided that we need to make some adjustments. We will be reducing the headcount [throughout the company] [in your area] Unfortunately, that means that we are going to have to lay you off as of today. I would like you to know that this action is not easily taken and is made only after long and careful review of many options.

We have an information packet for your review. There are frequently asked questions and other information to assist you. There are materials to help you with looking for employment, filing for unemployment, a booklet called "Surviving a Layoff" and an EAP brochure with additional resources to assist you with your transition.

You will be paid for the rest of the day today, unless there is non-compliance with request to turn in uniforms, etc. You will be also be paid any unused vacation if you are in good standing with the company. Your last paycheck will be _____. Your health insurance will continue until _____. You will receive information on health insurance continuation.

We appreciate your efforts and dedication to the company. We wish you well.

Other Things to Discuss

Take out the termination checklist. Go over what the employee needs to return.

Other potential issues to deal with during termination meeting:

- Expenses that have yet to be submitted.
- You will be escorted out by x after going to get your things.
- This is the plan for your personal effects. Alternate date or ship.
- Any uniforms you have at home…

Please do not communicate with other staff.

Are there any outstanding items or projects you would like to inform us about? Any outstanding issues with current colleagues? Any feedback on your experience?

May want to ask for a permanent email address (but mailing address will also do).

Remind of confidentiality agreement.

18. Memo to Surviving Employees Regarding Reduction In Force

To:

From:

Date:

Re: Reduction in Force

Yesterday, we had to share difficult news with a number of employees. After a review of the current state of the business, we decided that we needed to reduce our staffing. As a result, several of your co-workers were laid off. This was not an easy decision, but it was a necessary step in order to guarantee the continued success of the company.

We expect that this will be a permanent layoff for the affected employees, although we will retain a call-back list in the event that our need for an increase in staffing occurs. We also provided information for the affected employees on collecting unemployment and access to our Employee Assistance Program.

We expect that this reduction in force will give us the staffing we need to make the company successful in today's economic environment. We do not expect additional layoffs. We value the employees who are here and ask for your commitment to making our business operate successfully into the future.

19. Manager/Supervisor Training Tool for Reduction In Force

The following text may be used in a PowerPoint or whiteboard-based training exercise.

Supervisor Training – Reductions in Force

Overview

- Changes in business climate or company strategies may require a realignment of the workforce though a Reduction in Force (RIF)
- Supervisors and managers have a significant role in a RIF
- Goal of training is to educate supervisors and managers about compliance issues in RIF and in notifying affected employees that their jobs are being eliminated

Contents of Training

- RIF determinations
- Mechanics of RIF process
- Preparation for conducting employee meetings

RIF General Principles

- Senior management will determine when a RIF is necessary and economic or strategic justification
- All notifications to affected employees will be done in person with a prepared script
- Job eliminations in RIF are not temporary, although it may be possible in some situations that an employee terminated in a RIF may be re-hired in a different position
- Pending or post-RIF matters are strictly confidential and may not be discussed with anyone who does not have authorization
- Employees being released will be eligible for pay/benefit continuation as determined by the Company
- It is the supervisor/manager's responsibility to ensure that all Company property is returned by affected employees

RIF Determinations

- Senior management will develop the business rationale for the RIF
- Supervisors/managers will assist in determining which activities, programs, projects, organizations and/or job classifications can be reduced

- Supervisors/managers will assist in determining the functions/jobs that will need to be performed after the RIF
- Supervisors/managers will assess employees in functional areas to be reduced according to an assessment matrix developed by Human Resources

Assessment Matrix

- You will be asked to prepare a scoring sheet for each employee being considered for possible job elimination with the following factors:
    - Past performance
    - Special skills, experience or other qualifications
    - Current job knowledge/post layoff potential
    - Prior discipline
    - Teamwork
    - Length of service [Optional]
- Decisions must not be based on any protected category under federal and state discrimination laws

Preparation For Termination Meeting

- Informing affected employees will be difficult and unpleasant
- Make arrangements/schedule to meet with the affected employees in person (location; time; witness)
- Advise each affected employee of need to meet; prepare to respond very generally if asked reason for meeting
- Anticipate questions and prepare answers
- Be aware and prepared that meeting will be emotional; be prepared for unusual emotional reactions

The Termination Meeting

- Meeting should be private and uninterrupted
- Announce decision directly; stick to the script for the meeting; stay calm and control the meeting
- Do not blame others for termination decision
- Avoid comments about employee performance or other employees
- Make sure employee understands that decision is final
- Be empathetic
- But do not become defensive or argumentative – your role is to announce decision; not to justify it

- Document any statements or actions that could lead to potential problem and advice HR; i.e., claims of discrimination, harassment or retaliation
- Collect or make arrangements to collect all Company property
- Exit the employee in a dignified manner

Potential Employee Responses in Termination Meeting

- Become resistant; will not accept decision
- Want to plead case or bargain for another chance
- Want to speak to someone higher in authority
- Threaten a lawsuit
- Argue about other employees who employee believes are less capable, less tenure, etc.
- Accusation of personal dislike by supervisor
- Why me?

Benefits Questions and Answers

- How much severance pay will I receive?
- How long will health insurance be available?
- What options do I have for health insurance continuation?
- What happens to my retirement plan?
- Will I be paid for unused vacation/PTO time?
- Will I be paid for accrued sick time?
- When will I receive my final paycheck?

Questions??