# WEBINAR OVERVIEW

## Reductions in Force, Layoffs and Reduced Hours

July 26, 2023

**INTRO/SETTING THE STAGE**

- Reductions in Force, Layoffs and Reduced Hours: Common Concerns for Employers
- Understanding Reduction in Force Issues for the Employer

**WARN ACT**

- Federal WARN Act
- New York WARN Act
    - Updates

**ADHERENCE WITH THE ADEA, OWBPA AND EEOC**

- The Process
- Developing Nondiscriminatory Criteria for Selection

**BEST PRACTICES FOR REDUCTIONS IN FORCE, LAYOFFS AND REDUCED HOURS**

- Considerations for Reduction in Force/Layoffs

**HRtelligence TIPS**

# WEBINAR OUTLINE

## I. INTRO/SETTING THE STAGE

### A. Reductions in Force, Layoffs and Reduced Hours: Common Concerns for Employers

- RIFs are complex and often must be implemented urgently.
- Federal and state laws may apply to an employer's RIF and, if violated, may result in costly legal claims.

*Note: Given the current state of economic uncertainty, some employers have considered or turned to a reduction-in-force (RIF) or mass layoffs. During such tumultuous times, it is important that employers carry out any RIF with documented care and precision in order to avoid potential legal pitfalls.*

*Preparation is key, as there are many issues that can be triggered if a RIF is implemented haphazardly. An employer should carefully walk through the following steps and considerations.*

### B. Understanding Reductions in Force, Layoffs and Reduced Hours

Conducting a layoff is a difficult process that some businesses may have to face. The basic compliance components to review during the layoff/RIF process are outlined below.

#### 1. SELECT EMPLOYEES FOR LAYOFF

*Note: After an employer has designed its future organizational structure, a system for determining who will stay and who will go must be created. The selection criteria should be designed to identify the employee traits that will be instrumental in meeting the company's goals. Several factors can be used in deciding the selection process, including seniority, performance, job classification or job knowledge and skills. However, an organization should not consider criteria such as leave status or protected conduct (i.e., whistle-blower). By aligning the future goals of the organization with the best selection process, the company will be able to determine its success going forward.*

#### 2. AVOID ADVERSE ACTION/DISPARATE IMPACT

*Note: An organization should review the selected employees for layoff to determine if an adverse (disparate) impact exists for a protected class. Protected classes include individuals who are members of a certain race, color, ethnicity, national origin, religion, gender, genetic information, age (40 or over), those with a disability or those who have veteran status. States may have additional protected classes, such as sexual orientation, marital status or smokers. Any protected class that may have a disproportionately larger percentage affected by the layoff (e.g., employees reaching retirement age) will need to be evaluated and substantiated.*

#### 3. COMPLY WITH WARN ACT REGULATIONS

*Note: The federal Worker Adjustment and Retraining Notification (WARN) Act requires employers conducting a large-scale layoff to provide 60 days' notice to affected employees (few exceptions apply). Employers must inform*

*affected employees if the layoff is permanent or temporary, and if the latter, what the expected duration is. Employees must be notified of their expected separation date, and if there are any bumping rights. Employers should clearly outline the process for recall rights and applying for future positions with the company if applicable. In addition, a number of states have enacted "mini-WARN" legislation that extends notice requirements to smaller businesses conducting layoffs. Reviewing state laws will be important given that mini-WARN Acts often impose additional requirements that differ from federal law. (see below)*

## 4. DETERMINE SEVERANCE PACKAGES AND ADDITIONAL SERVICES

*Note: Many employers offer severance packages to their displaced employees. Employers are not obligated to provide severance to laid-off employees under federal law, but severance packages may lessen the chance of legal action filed on behalf of former employees. Some states, however, have specific criteria for required severance. Severance packages may include salary continuation; vacation pay; continued, employer-paid period of benefits coverage; employer-paid COBRA premiums; outplacement services; counseling and resume workshops; and more.*

## 5. REVIEW OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA) REGULATIONS FOR COMPLIANCE

*Note: Employers must comply with the OWBPA to effectively release claims under the Age Discrimination in Employment Act (ADEA) when employees are asked to waive age discrimination claims in exchange for severance pay. The 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.*

## 6. CONDUCT THE LAYOFF SESSION

*Note: Employer communication during a layoff or RIF will be scrutinized. Notifying employees individually, being respectful and understanding the significance of such business decisions on the individual is necessary. Sitting down with an employee who is about to be laid off will be difficult, but if handled professionally, it may reduce potential anger and resentment from the employee. Employers must ensure that they are prepared for this meeting and that all information has been collected and available to the employee. Employers will want to be sympathetic and explain the reasons for the layoff, review health benefits and COBRA election procedures, 401(k) options, outplacement services, and the rehire process, if available. Employers may also want to provide information on the unemployment process, along with any other job placement information available for displaced workers. It is also recommended to review the severance agreement with the employee and answer any questions the employee may have before leaving the company. Employers may also want to offer to answer any questions that employees may have over the next several weeks. If an organization has an employee assistance program, then this information should be provided as well to aid those employees and family members affected by the layoff.*

## 7. INFORM WORKFORCE OF LAYOFF

*Note: Notifying the remaining workforce of the layoffs that were conducted will help squelch potential rumors. The employer may also want to communicate the company's financial position and its commitment to meeting company goals and objectives going forward with the current workforce. Many of the employees the employer is addressing had built strong friendships with the laid-off co-workers, and they will be anxious to know their future with the company as well. Employers should be prepared to honestly communicate and answer questions to keep morale and productivity high going forward. Employers will need everyone on board and aware of the future challenges to be successful.*

# II. WARN ACT

## A. Federal WARN Act

The Worker Adjustment and Retraining Notification Act (WARN) requires 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.

**Plant Closing**

- Covered employers must provide 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 for 50 or more employees during any 30 day period.

**Mass Layoff**

- Covered employers must provide notice if there will be a mass layoff which does not result from a plant closing, but will result in an employment loss at an employment site for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer's total active workforce, during any 30 day period.

- Covered employers must also give notice if the number of employment losses for 2 or more groups of workers, each of which is less than the minimum number needed to trigger the notice requirement under the Act, reaches the threshold level during any 90 day period of either a plant closing or mass layoff. Such job losses within a 90 day period will count together toward the Act threshold requirements unless the employer demonstrates that the losses during the 90 day period were the result of separate and distinct actions and causes.

**Sale of Business**

- If the sale of a business by a covered employer results in a covered plant closing or mass layoff, notice is required. The notice must be provided by the seller if the closing or layoff occurs up to and including the date/time of the sale. The buyer is required to provide the notice if the closing or layoff occurs after the date/time of the sale. Covered employees of the seller become employees of the buyer, for purposes of the Act, immediately following the sale.

**Notice Requirements**

- Covered employers must give written notice to the chief elected officer of the exclusive representative(s) or bargaining agency of the affected employees and to any unrepresented workers who may reasonably be expected to experience an employment loss as defined by the Act. Notice must be given to employees who have worked less than 6 months in the preceding 12 months and employees that have worked an average of less than 20 hours per week even though such employees are not counted when determining if a triggering event has occurred. Notice must also be given to any employees who may lose their job due to "bumping" or displacement by other workers, if the employer can identify such employees at the time notice is given. If the employer cannot determine the identity of such employees, it must provide notice to any incumbents who hold positions that are being eliminated.

- Covered employers must also provide notice to the State dislocated worker unit and to the chief elected official of the unit of government in which the employment site is located.

- Notice must be provided at least 60 days before a covered closing or layoff. When the individual employment separations related to a closing or layoff occur on more than one day, the notices are due at least 60 days before each separation.

## B. New York State WARN Act

The **NYS WARN Act**, which provides stricter requirements than the federal Worker Adjustment and Retraining Notification Act of 1988, requires businesses with fifty or more full-time employees to provide ninety days' notice of employment losses to affected employees and certain government entities or officials. Under the statute, an "employment loss" is defined as "(a) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (b) a mass layoff exceeding six months; [or] (c) a reduction in hours of work of more than fifty percent during each month of any consecutive six-month period." The statute further defines a "mass layoff" as "a reduction in force" which:

a. is not the result of a plant closing; and
b. results in an employment loss at a single site of employment during any thirty-day period for:

    i. at least thirty-three percent of the employees (excluding part-time employees); and
    ii. at least twenty-five employees (excluding part-time employees); or

iii. at least two hundred fifty employees (excluding part-time employees).

**Updated Regulations**

The updated regulations, which took effect immediately, reflect statutory changes made to the NYS WARN Act in 2021, and provide additional clarification for employers anticipating plant closings, mass layoffs, relocations, or reductions in work hours. The updated regulations mirror the proposed regulations issued by the NYSDOL on March 29, 2023. Notable updates include the following:

- Remote employees included in determining employer coverage. For purposes of establishing employer coverage, full-time remote employees based at an affected site are now included in assessing whether an employer meets the fifty-employee threshold.
- Selling employer relieved of liability in limited circumstances. If the transfer of employees is a condition of a purchase agreement, a selling employer is now relieved of liability if the purchasing employer fails to provide employees with proper notice.
- Requirement to provide notice to additional entities. Employers must now provide notice to the following entities where the site of employment is located: the chief elected official of the unit or units of local government; the school district; and the locality that provides police, firefighting, emergency medical or ambulance services, or other emergency services.
- Additional information to be included in notice to commissioner of labor. Notice to the commissioner of labor must now include: "[t]he complete legal business name, and any business names used in the operation of the business"; business addresses and email addresses for the employer's and employees' agents; the personal telephone number, personal email address (if known), job title, work location, full-time or part-time status, method of payment (i.e., hourly, salary, or commission basis), and union affiliation of each employee to be laid off; the total number of full-time and part-time employees in New York State and at each affected site; the number of affected full-time and part-time employees at each affected site; and "[a]ny additional information required by the [c]ommissioner."
- Additional information to be included in notice to employees. Notice to employees must now include: the complete legal business name and any business names used in the operation of the business; the address of the affected employment site; the separation date; the business address and email address of the employer's agent; information on severance packages or financial incentives if an employee continues to work until the effective date of the planned action; available dislocated worker assistance; and the estimated duration if the planned action is expected to be temporary.
- Qualifying unforeseeable business circumstances. The list of unforeseeable business circumstances warranting an exception to the NYS WARN Act's notice

period is expanded to include "a public health emergency, including but not limited to a pandemic, that results in a sudden and unexpected closure, [and] a terrorist attack directly affecting operations."

- Determining applicability of exceptions to the NYS WARN Act's notice requirement. Employers must submit a request to the commissioner of labor for a determination on the applicability of an exception to the NYS WARN Act's employee notice requirement. This request must be submitted "within ten business days of the required notice being provided to the [c]ommissioner, and must be supported by "documentation demonstrating the applicability of an exception." The regulations also require employers to submit an affidavit containing "a declaration signed under penalty of perjury" stating that the documentation submitted to the commissioner is "true and correct."

*Notes: On June 21, 2023, the New York Department of Labor's amendments to the NY WARN regulations took effect and some of the changes are sweeping.*

***Employer Coverage***

*Under the amended regulations, the definition of a covered employer is expanded to count not just employees at a single site of employment in the state, but also employees who work remotely but are "based at the employment site."*

***New Notice Content Requirements***

*On top of NY WARN's already long list of notice content requirements, the amended regulations add that the notice to the New York Commissioner of Labor must include:*

*i. business addresses and email addresses for the employer's and employees' agents;*
*ii. the personal telephone numbers, personal email addresses (if known), work locations, part-time/full-time status, method of payment* (i.e., *hourly, salary, or commission basis), and union affiliation for each affected employee;*
*iii. the total number of full-time employees in New York State and at each affected site, as well as the number of affected employees at each affected site; and*
*iv. the total number of part-time employees in New York State and at each affected site, as well as the number of affected employees at each affected site.*

*Notice to affected employees must now also include relevant information known at the time of the notice, such as information on severance packages or financial incentives if the employee remains and works until the effective date of the layoff, available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration.*

***Revisions to the Sale of Business Provision and NY WARN Exceptions***

*NY WARN's sale of business provision was amended to clarify that sellers will not have an obligation to give WARN notice if the transfer of employees in the sale is a good-faith condition of the purchase agreement, and the purchasing employer does not uphold that condition. In that scenario, the purchasing employer would need to provide notice.*

*Additionally, NY WARN's exceptions, which permit an employer in some cases to give less than the full 90-days' notice to affected employees, remain in place with some tweaks:*

- *The faltering company exception is now applicable only to plant closings (mirroring the federal WARN Act).*
- *The unforeseeable business circumstances exception was amended to include public health emergencies, such as a pandemic, that result in a sudden and unexpected closure, and a terrorist attack directly affecting operations as new examples of circumstances that would qualify for this exception.*

***New Process for Claiming Eligibility for a NY WARN Exception***

*The amended regulations now require that employers submit a request to the Commissioner to be considered eligible for an exception. The request to the Commissioner must be submitted within 10 business days of the required WARN notice being provided to the Commissioner unless an extension of time is granted. Employers must also provide documentation to demonstrate the applicability of the exception, including a statement explaining the reasons for the layoff, closure, or hours reduction; a description as to why a shorter notice period is required; and an affidavit signed under penalty of perjury confirming the documents are true and correct, among other documentation.*

*The Commissioner will then conduct an investigation and determine whether the employer qualifies for the exception. Should additional information be needed, the Commissioner may request an investigative conference with the employer and the employer's attorney.*

*If the Commissioner determines that the employer failed to establish the elements of an exception, the Commissioner will proceed to an enforcement action and determine the employer's liability for violating NY WARN.*

# III. Adherence with the ADEA, OWBPA and EEOC

## A. The Process

Before implementing a layoff or reduction in force (RIF), review the process to determine if it will result in the disproportionate dismissal of older employees, employees with disabilities or any other group protected by federal employment discrimination laws.

Under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act and OWBPA when a company has a layoff, the company may not discriminate based on race, sex, disability, or age for employees who are 40 years or older. When a layoff involves two or more employees, if the company will offer a severance agreement to obtain employees' waiver of discrimination claims, the employees have 45 days to review it. (If the layoff involves just one employee, that person has only 21 days to review the agreement.)

The agreement should include the objective criteria used for the selection process (ie seniority, attendance, performance review ratings, or some combination of these factors). The laid-off workers must be told the job titles and ages of all laid off, so that the employees can be better informed when deciding whether to sign the severance agreement and waive their age discrimination claims.

If the Company is eliminating a certain amount of jobs throughout the Company, then the company has to disclose the titles/ages of all the employees at the Company who were/were not selected for the layoff. If the Company is eliminated jobs only in a certain department (i.e., Warehouse), then the Company just has to disclose the titles/ages of all the employees in that particular department who were/were not selected for elimination.

*Note: per the EEOC's website: 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: 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.*

## B. Developing Nondiscriminatory Criteria for Selection

Examples of specific nondiscriminatory criteria for selection can include:

- temporary employees;
- past performance reviews;
- attendance;
- positive teamwork;
- versatility (ability to perform more than one job or function);
- department or production line closures (you may just select an entire production line);
- elimination or consolidation of specific jobs;

- relative ability of the employee;
- training, certification, education, and experience;
- production records or any other objective criteria that you decide is relevant.

***Notes: Human resources review for bias****. After selecting the employees, human resources must review personnel files and the notes of managers for comments that may be evidence of bias related to a protected class. If there is bias, reconsider inclusion of that employee in the group.*

***Perform a statistical analysis for EEOC impact****. One of the most important steps in the process is to determine the Equal Employment Opportunity impact of employees selected for layoff. This step is necessary because many discrimination claims are based on the argument that the reduction in force had a* disparate impact *on a particular protected class, such as age, disability, sex, etc. A plaintiff can prove unlawful discrimination by establishing that the employer's neutral policies or practices have a* disproportionate *effect on employees in a protected class. A statistical analysis is a way of determining whether there is a potential disparate impact in the employees chosen for the reduction in force. You want to see employees in protected groups laid off at an equal rate or below the average rate for all employees being laid off (and those being retained).*

*It is important to carefully consider who will conduct the analysis, the method to be used, and the underlying data that will be analyzed. A company can perform a simple statistical analysis in house, but may need to hire an expert to perform a more complicated analysis. The failure to do a proper analysis will negate its value if legally challenged. If the statistical analysis supports that you are laying off a high percentage of employees in a protected class, then it may be necessary to reconfigure the RIF so that you choose other employees to lay off who may have been close or borderline for the program.*

# IV. Best Practices for Reductions in Force, Layoffs and Reduced Hours

## A. Considerations Before Reduction in Force/Layoffs

### 1. Identify Desired Objectives and Consider Whether Alternative Cost-Saving Measures Exist

- Before moving forward with a RIF, it is important to understand and consider other cost-saving alternatives.

*Note: From an employee relations standpoint, exploring alternatives can demonstrate that an employer evaluated less severe measures before resorting to layoffs. From a legal standpoint, making such considerations may help an employer defend the necessity of the RIF, if challenged down the road.*

*For example, an employer may consider a hiring freeze in specific work units or departments or instituting some form of a pre-layoff promotion and transfer freeze. Other temporary cost-saving measures include implementing a temporary furlough, temporarily reducing employees' hours, or temporarily reducing employees' pay. However, even these temporary cost saving measures come with their own compliance challenges and risks.*

### 2. Make Initial Logistical Decisions

- Once an employer determines that there is no other course of action, the employer should establish a decision-making team to take charge of the RIF process.

*Note: Ideally, the team should include a representative from each stakeholder area (e.g., human resources, legal, upper management, key supervisors in affected work units, etc.) and closely coordinate with the employer's workplace legal counsel.*

- *This team should then make initial decisions about the planned actions and execution, including:*
    - The necessary scope of the RIF (how many positions to reduce or re-organize)
    - Whether voluntary separations will be solicited from current employees
    - The operational budget to implement the RIF (legal fees, severance payouts, unemployment insurance)
    - The timing of the layoffs and notification to employees

*Note: Proper timing is crucial. There are many federal and state-specific laws that place onerous requirements on employers engaging in a RIF.*

## 3. Create a Selection Process for Layoffs

- The most scrutinized part of any RIF is the selection process and criteria used to determine which employees will be let go. Some common criteria include:
    - **Seniority**: An objective criteria based on the concept of last hired, first fired.
    - **Skillset or Versatility**: Retaining workers with the most in-demand or versatile skills and experience.
    - **Merit**: Selecting workers based on the objective performance metrics of each employee. Often, this is the preferred choice because of the practice of weeding out poor performers.

*Note: Employers often use a combination of the above criteria. The key is to develop thoughtful, objective selection criteria that are thoroughly reviewed and vetted by all decision-makers, ideally with the assistance of legal counsel.*

***Employers should be cautious to assess employees' skillset or performance based on actual objective metrics, rather than a specific manager's subjective opinion about an employee.***

*Likewise, skillset or merit-based criteria can create potential liability where an employee's objective performance is difficult to quantify or compare with other similarly situated employees. This is where objective documentation, such as annual performance reviews, play a significant role.*

*Before finalizing the list of employees based on objective criteria, an employer should run a statistical discrimination analysis of the selected employees to determine if the numbers suggest discrimination based on any protected category (e.g. gender, race, age, etc.).*

*If the statistical analysis reveals potential imbalances, then the employer should explore the variances that create the discrepancy and ensure that the non-discriminatory reasons for the statistical variance are documented and well-established. Finally, if the workforce is unionized, then an employer must also examine all bargaining obligations under the operative collective bargaining agreement.*

**4. Understand the Various Intersecting Laws**

- A RIF is subject to various federal, state, and local laws, such as the federal Worker Adjustment and Retraining Notification (WARN) Act and state-specific "mini-WARN" laws.

**5. Consider Whether Severance Agreements Are Appropriate**

- In some situations, an employer may decide to provide severance payments to selected employees in exchange for a general release of claims and liability in the form of severance agreements. Severance pay is a payout that goes above and beyond what is owed to an employee for work performed or as final wages owed to that employee.

*Note: There are a number of individualized factors that an employer should consider prior to issuing and obtaining signed severance agreements, including but not limited to, focusing on vacation and other PTO benefits earned, retirement/severance overlap, unemployment benefits, state-specific release requirements, and the Older Worker Benefits Protection Act (OWBPA) for those age 40 or older.*

**6. Effective Communication**

- One of the most difficult parts of a RIF is communicating the news to selected employees as well as the entire workforce.

*Note: Employers should ensure that the news is delivered with empathy and understanding through the proper messenger.*

*An employer may also consider whether public announcements are necessary to the local community and general public. How to deliver the message varies on a case-by-case basis, but it is important for leadership and the decision-making team to spend time weighing all the options to determine best practice.*

Source: https://www.jobvite.com/blog/reduction-in-force/