Terminations Without Tears: Avoiding Litigation Risks In Reductions In Force

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A. Understanding The Litigation Context

1. Planning reductions in force (“RIFs”) today necessarily includes planning to avoid litigation. Although RIFs do spawn contract litigation or litigation under The Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2101 et seq. (“WARN”), which requires 60 days’ notice of certain mass terminations, the most serious legal challenges to RIFs are those alleging age or other prohibited discrimination in selecting terminees. Understanding who will bear what burdens of proof in that kind of lawsuit is the necessary context for planning a RIF without difficult litigation.

2. Plaintiffs in RIFs most commonly claim they were terminated “because” they were members of a group protected from employment discrimination by federal and state laws. To prevail, terminees must prove that status as a member of a protected group was a motivating factor in their selection for adverse treatment in the RIF.

3. This issue normally turns on the intent of the employer. The only direct evidence of intent is the testimony of the actor, but triers of fact are skeptical of testimony of sanctimonious intent, so plaintiffs can get to a jury by showing circumstantial evidence.

4. However, in recent years and just this June, the Supreme Court has sanctioned another approach whereby if an expert statistician can demonstrate that a RIF of numerous employees affects a statistically significant number of members of a protected class (such as older workers), the burden of persuasion will be on the employer to demonstrate a business necessity for making the suspect selections or, in Age Discrimination in Employment Act (ADEA) cases, that the selection was made based on

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reasonable factors other than age. *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (June 19, 2008), holds that choosing a terminee based on a reasonable factor other than age does not violate the ADEA, but the employer had the burden of persuasion on this issue before a jury when a statistical expert opined that the odds of selecting a disproportionately large number of employees over 40 were thousands to one.

5. The courts have, therefore, developed a complicated scheme of presumptions and shifting burdens to give plaintiffs a fair chance to reach the trier of fact without encouraging frivolous lawsuits.

6. **The Employee’s “Prima Facie” Case Burden**

   a. The employee may force the employer to articulate its reasons for selecting the plaintiff by establishing a prima facie case (sometimes called raising a presumption of illegal discriminatory intent), which requires showing:

   i. Membership in a protected class;

   ii. Termination (or some other adverse employment action);

   iii. Qualification for the job; and

   iv. That someone not in the protected class received better treatment.


7. **The Employer’s Burden To Articulate A Legal Reason For Terminating Each Plaintiff**

   a. The burden of production (but not persuasion) then shifts to the employer to articulate a non-discriminatory business reason for its actions. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

8. **The Presumption Of Illegality Disappears**

   a. Once the employer articulates its reason, the prima facie presumption disappears from the case and plaintiffs still have the burden of proving they were terminated because they were protected class members. *Burdine*, supra.

   b. The plaintiff has the burden and opportunity to get to the trier of fact by showing that “a discriminatory reason more likely motivated the employer” or “the employer’s proffered explanation is unworthy of credence.” *Burdine*, 450 U.S. at 256. The plaintiff may do this in a variety of ways including:

   i. Statistical proof that the RIF has a statistically significant adverse impact on members of the protected classes that is not explainable by business reasons. (Actions speak louder than words.)

   ii. Actual admissions of illegal intent by authorized agents of the employer who acted in or influenced the RIF. (Anything an employer or agent says can be used against them.)

   iii. Anecdotal testimony, usually about statements made by supervisors tending to show illegal intent (in effect, smoking gun statements). (“A smile and a suitcase,” “the old fellow’s lost it,” “that ethnic group is just lazy,” etc.)

   iv. Evidence tending to show that the articulated reason is untrue. Because employers are presumably reasonable, the only reason to lie is to cover up illegal intent to discriminate. (This begins to sound a lot like the notion of consciousness of guilt that arises in criminal cases.)
v. Inconsistent statements made by someone who speaks for the employer. (Everyone had better be on the same wavelength.)

vi. Shifting stories during the preliminary administrative or pretrial proceedings.

9. **Defendants Then Have An Opportunity (And Burden) To Show It Would Have Happened Anyway**

   a. Finally, if the plaintiff establishes that a prohibited factor motivated an employment action (even if other lawful factors also motivated the employer), the employer is given an opportunity to demonstrate that the same action would have been taken despite the discriminatory motive. 42 U.S.C. §2000e-2(m). If the employer is successful, the court may not award damages or require reinstatement, promotion, or hiring. The employer may be prohibited from considering the unlawful factor in the future, and the court may award attorney fees and costs. 42 U.S.C. §2000e-5(g)(2)(B).

10. **The Bottom Line**

   a. With this scheme in mind, it becomes vitally important for an employer to take extra care in planning a RIF to avoid the fact and indicia of illegal discrimination. Most terminees who leave jobs that they have been doing for some time have little difficulty asserting their prima facie case. Litigation then turns on the trier of fact’s view of the employer’s articulated reasons and the plaintiff’s evidence of pretext.

   b. A finding of discrimination against members of protected classes eliminates the cost savings motivating the RIF; a winning plaintiff will receive back pay for no work and the incumbent who was retained will already have been paid for the work.

   c. Losing the litigation means that the employer pays two people for the same work: the retained employee and the terminee.

   d. Losing an age discrimination claim can mean paying three times because a terminated employee is paid double damages, as liquidated damages, if the plaintiff shows that the unlawful age discrimination was “willful.”

   e. Losing a discrimination claim in some states can tack on damages for “pain and suffering,” or even punitive damages, if the judge or jury despises the employer’s witnesses.

   f. The saddest fact is that no employer can “win” a discrimination suit. Defending litigation successfully still costs employers executive time and distraction and incurs considerable legal fees because the litigation most often requires that the entire work records of both the terminee and the retained employees be presented to the trier of fact.

   g. Careful planning of any RIF is necessary to preserve cost savings and avoid or prevail in litigation. The following Reduction in Force Methodologies and Checklist suggest a system for considering, ameliorating, or eliminating unwarranted risks, or at least allowing the employer to decide which level of risk it is willing to accept.

**B. Reduction In Force Methodologies**

1. **Understand What The Workforce Looks Like Before The RIF.** Rationale: Knowing where you’re coming from helps identify possible problem areas that may require special attention.

   a. Review or prepare organizational charts that accurately reflect the organization.

   b. Prepare Equal Employment Opportunity (EEO) category analyses, overall and by appropriate categories (for example, classifications, skill levels, or work areas).
i. First, analyze the numbers and percentages of protected class members in the workforce categories from which reductions are to be made. Protected classes include racial minorities, women, Hispanics, Asians, Pacific Islanders, Native Americans and Aleuts, other minority national origin groupings (which could include Americans in a foreign-owned corporation), religion-based groupings, older workers (usually over 40), members of groups that may be protected from discrimination by state or local laws (whistleblower, affectional preference, marital status, sexual orientation, etc.), workers with disabilities, and workers about to reach a new level of pension or employee benefit eligibility.

ii. The analysis may be made by the employer’s human resources professionals or the employer’s attorneys. Using attorneys may offer a modicum of privilege if proper precautions are observed, but the lawyer who does the analysis may have to testify and may thereby be disqualified from representing the employer in litigation.

iii. The analysis should be made in the following groupings:

1. EEO category of job level. EEO categories for job levels should include at least the following nine categories, which are found in the EEO-1 form employers are required to file annually: Officials and Managers, Professionals, Technicians, Sales Workers, Office and Clerical, Craftsmen (skilled), Operatives (semi-skilled), Laborers (unskilled), and Service Workers.

2. Job title or category as denominated in the employer’s own records and personnel files. Job category analysis can be done in the format in which the employer keeps its personnel records. Depending on the sophistication of the employer’s personnel function, this analysis could be by departmental grouping, job title, labor grade, Hay (or similar pay or functional analysis system) category, or other grouping regularly used by the employer (for example, territory, plant, zone, function, etc.).

3. Overall and departmental employment units.

iv. It is often useful to analyze each job grouping in terms of numbers and percentages of protected class members as compared to non-protected class members. But, of course, when the number of the total group is smaller than 50, statistical significance is slight.

c. When the effect of a RIF at a higher employment level results in bumping down, with displacement of employees in lower categories, it is also necessary to do the analysis for the peripherally affected classifications or groupings.

2. Understand What Motivates The RIF
   Rationale: In litigation, the ultimate defense is the employer’s legitimate business reason. Making that reason explicit will guide choices consistent with that reason and, if there is a lawsuit, avoid the appearance of pretext.

   a. Before designing or evaluating a RIF plan, it is vital to understand why the employer is downsizing. It is also important to recognize the multiple reasons that may motivate the employer’s selection processes and that not all of the reasons may be immediate economic necessity.

   b. Common reasons for a RIF:

      i. Reduce production;
      ii. Abandon a line of business;
      iii. Close a particular facility;
      iv. Consolidate facilities;
v. Restructure operations;
vi. Streamline or eliminate departments, functions, jobs, or layers of management;
vii. Combine departments or functions.

3. **Understand What The Personnel Structure Will Look Like After The RIF**
   
   **Rationale:** Defense of RIF litigation often turns on why the retained employee was kept and the RIF’d employee was terminated. Relating the retained position to the new organization—and hence the purposes of the RIF—cannot succeed unless planners are clear on what the “future” is supposed to look like.

   a. What will the table of organization look like?
   b. What positions will be needed?
   c. How will each job be filled?
   d. How will the employer get from the present structure to the future structure?
      i. Which employees most appropriately fit the new organization?
      ii. Which skills best fit the future organization?
      iii. Who does not fit into the future at all?
      iv. Must new skills be sought outside the organization or can incumbents adapt?

4. **Understand Selection Methodologies.**
   
   **Rationale:** Different selection strategies have different effects on: (a) achieving the RIF’s objectives; and (b) avoiding litigation. Getting the right balance between these sometimes conflicting aims is crucial.

   a. **Seniority**
      i. Seniority has the advantage of being recognized as a “safe harbor” by most anti-discrimination statutes (for example, it is permissible to observe the terms of a bona fide seniority system even if the result produces discrimination against individuals in the protected groups of age (29 U.S.C. §623(f)(2)), race, color, sex, religion, or national origin (42 U.S.C. §2000e-2(h)). Although the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., contains no such safe harbor, selection by seniority is certainly not selection because of a disability.
      ii. Determining the measure of seniority:
         (1) Most recent date of hire (employer seniority);
         (2) Date of entry into job or other category (job or category seniority);
         (3) Other seniority measures in use by the employer before the RIF.
      iii. Can the employer lay off the least senior employees in the entire organization and bump down more skilled or senior employees into vacant positions?

   b. **Selection By Ability And Performance.** It is vital to be able to explain and justify each termination or demotion of a protected class member.
      i. Review personnel files and performance evaluations.
         (1) Every good word in a terminee’s performance evaluation will be claimed to be universal truth in subsequent suits.
(2) Good evaluations do not prove illegal discrimination. But terminating those with better evaluations implies a hidden agenda. Adequate (or even excellent) employees are often terminated in RIFs, so retaining better performers is defensible.

(3) Employers wisely start their termination list with those whose performance evaluations have been less than adequate. But it is the fact of inadequate performance, not the bare notation, that may have to be proved if the termination is challenged.

ii. When selecting terminees from a group of individuals who have adequate or superior performance evaluations, identify specific reasons for the choice.

(1) Compare written personnel records and undertake contemporaneous comparative rating procedures.

(2) Ask supervisors to give management a list of those who should be retained (but this is only the beginning).

(3) Make supervisors articulate their reasons and be able to justify the choice of potential plaintiff protected class members.

(4) Ask supervisors and managers to rate the employees in the categories where jobs and incumbents are to be eliminated.

(5) Have supervisors and managers rank incumbents in each job category from lowest to highest.

(6) Do similar rankings for those considered for jobs left in the post-RIF structure.

(7) Ask for detailed narrative reasons for the expressed preferences, preferably with specific examples of incompetent, inadequate, unimaginative, or unsatisfactory work. When choosing between those with adequate performance, try to retain those with objective evidence of some superiority.

(8) Cross check by having others rate and rank potential terminees as well as those being retained.

(9) If disagreement appears, decide what risks to take.

iii. Ask whether the rationale adopted will seem fair to a trier of fact (judge, jury, or anti-discrimination agency). Fairness and fair warning are the hidden agenda of every termination litigation.

5. **Sidestepping Problems By Offering An Incentive For Voluntary Quits**

   i. A voluntary quit is not actionable termination by the employer unless there is constructive discharge.

   ii. Constructive discharge usually requires an element of forcing employees to quit, often by creating intolerable working conditions.

   iii. An offer of increased benefits is normally not constructive discharge unless it is deemed an “offer you can’t refuse.” *Henn v. National Geographic Soc.*, 819 F.2d 824 (7th Cir. 1987), cert. denied, 484 U.S. 964 (1987) (citing “The Godfather”).
iii. Those who have been terminated for seniority reasons;
iv. Those who have voluntarily quit.

b. Do a statistical analysis for potential exposure to suit.
i. What is the protected class composition of the workforce before and after the RIF?
ii. What is the protected class composition of relevant employee groupings before and after the RIF?
iii. What is the protected class composition of employee groupings before and after the RIF after voluntary quits have been eliminated?
iv. When statistics render the underlying reasons for selections at risk, if the risk is not reasonably defensible it may be necessary to change selection methodologies to eliminate or ameliorate the risk.

c. Check for other potential exposures.
i. WARN Act notice to employees and agencies for plant closing and mass layoffs.
ii. Union contracts or Multi-Employer Pension Plan Act exposure.
iii. Personnel manual or benefit plan promises.
iv. Individual employment promises or contracts.
v. Severance pay obligations under local law.

6. Planning The Actual Terminations

a. Prepare the voluntary termination offer package, including a valid release of potential liability.
i. Make sure the release is valid in that it:
   (1) Is knowing (suggest consultation with an attorney);
   (2) Is voluntary (enough time to consider options);
   (3) Is for additional valuable consideration (cash, benefits, outplacement assistance, etc.) over and above benefits to which terminees were otherwise entitled;
   (4) Satisfies the requirements of the Older Workers Benefit Protection Act of 1990 (“OWBPA”) if a group over age 40 is offered an exit incentive. This means that the release should:
       (A) Be written in understandable English;
       (B) State that rights under the ADEA, 29 U.S.C. §621 et seq., are being waived;
       (C) Not waive future rights;
       (D) Give at least 45 days to consider whether to accept the group exit incentive;
       (E) Provide a seven-day revocation period;
       (F) Advise the individual in writing to consult with an attorney;
       (G) Tell the individual (a) which groups of employees are eligible for the exit incentive, (b) any applicable eligibility factors or time limits, (c) the job titles and ages of all eligible or selected individuals, and (d) the ages of all individuals in the same job classification or organizational unit who are not eligible or selected.
ii. Allow sufficient time for the terminee to consider the offer (OWBPA requires 21 days for individual releases, 45 days for exit incentives, and seven days to revoke).

iii. Be sure that severance pay promises of handbooks and contracts satisfy legal requirements and require a valid release of claims as a condition of receiving the benefit.

iv. Be sure that the release satisfies state and federal requirements. As to most causes of action, the release has to meet the standard of “knowing, voluntary and for a valuable consideration.” That generally means that the employee must be advised to consult a lawyer and that all of the potential liabilities must be spelled out with great specificity. It also means that payment of amounts otherwise due (for example, vacation or unused sick leave) does not satisfy the valuable consideration test for claims under the ADEA.

7. **OWBPA, 29 U.S.C. § 626(f)**. Under OWBPA, however, there are additional very specific requirements for a release of claims under the ADEA.

a. **What Is OWBPA?**


ii. Under OWBPA, “[a]n employee ‘may not waive’ an ADEA claim unless the employer complies with the statute.” *Oubre*, 522 U.S. at 427. To this end, OWBPA “creates a series of prerequisites for ‘knowing and voluntary’ waivers.” *Id.* The eight mandatory elements for a “knowing and voluntary” waiver of ADEA claims are set forth in 29 U.S.C. §626(f)(1).

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum:

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to [ADEA] rights or claims;...

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;
if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

iii. In addition to the statutory requirements, waivers must satisfy other criteria. As one court has explained:

The statute sets up the minimum requirements that must be satisfied before a waiver is found “knowing and voluntary.” However, “[o]ther facts and circumstances may bear on the question of whether a waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver.” 29 C.F.R. § 1625.22(a)(3). Indeed, “[t]he waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. [And] [a]ny advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations.” Id. § 1625.22(b)(4); see also S. Rep. No. 101-263, at 31, as reprinted in 1990 U.S.C.C.A.N. 1509, 1537 . . . [Some] circuits apply a “totality of the circumstances” test to determine whether a particular waiver is “knowing and voluntary.” This further inquiry is necessary, however, only if the minimum statutory requirements are met.

Syverson v. IBM Corp., 472 F.3d 1072, 1007 n. 7 (9th Cir. 2007) (citing Kruchowski v. Weyerhaeuser Co., 423 F.3d 1139, 1142 (10th Cir. 2005), which was later withdrawn and superseded, 446 F.3d 1090 (10th Cir. 2006); Wastak v. Lehigh Valley Health Network, 342 F.3d 281, 294 n.8 (3d Cir. 2003); Griffin v. Kraft Gen. Foods, Inc., 62 F.3d 368, 373–74 (11th Cir. 1995)).

b. The Right To File A Charge With The EEOC May Not Be Waived

i. OWBPA’s mandates apply to releases under which employees agree not to file a lawsuit against the employer. In one case, the court specifically held that an employee may not waive the right to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). See EEOC v. Lockheed Martin Corp., 444 F. Supp. 2d 414 (D. Md. 2006).

c. “Knowing And Voluntary” Waiver: The Saga Of IBM

i. Often the dispute in OWBPA cases centers on whether the waiver is “knowing and voluntary,” a requirement that itself often turns on whether the waiver is part of an agreement “between the individual and the employer that is written in a manner calculated to be understood by [the] individual, or by the average individual eligible to participate” in a workforce reduction plan. 29 U.S.C. §626(f)(1)(A). To satisfy the “manner calculated” requirement, “[w]aiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate” in a group termination plan. 29 C.F.R. §1625.22(b)(3). Employers are thus instructed to “take into account such factors as the level of comprehension and education of typical participants.” Id. These considerations “usually will require the limitation or elimination of technical jargon and of long, complex sentences.” Id. See Syverson, supra.

ii. The issue of whether a waiver agreement used in connection with a severance benefit package is “knowing and voluntary” was at the heart of two decisions from two different circuits involving a broad RIF program implemented by IBM. See Syverson, supra, and Thomforde v. IBM Corp., 406 F.3d 500 (8th Cir. 2005). In both cases, the courts struck down the waiver agreement as too “ambiguous” to meet the “knowing and voluntary” standard, basically because lawyers had drafted a release and
covenant not to sue containing both belts and suspenders, which the courts found did not create protection, but instead introduced an element of ambiguity.

iii. The waiver at issue in both cases consisted of a document entitled “General Release and Covenant Not to Sue.” It provided, in relevant part:

If you feel that you are being coerced to sign this General Release and Covenant Not to Sue (hereinafter “Release”), [or] that your signing would for any reason not be voluntary … you are encouraged to discuss this with your manager, the MERA Project Office or Human Resources before signing this Release. In exchange for the sums and benefits received pursuant to the terms of the MICROELECTRONICS RESOURCE ACTION (MERA), [EMPLOYEE NAME], [hereinafter “you”) agrees to release and hereby does release [IBM] … from all claims, demands, actions or liabilities you may have against IBM of whatever kind including, but not limited to, those that are related to your employment with IBM, the termination of that employment, or other severance payments or your eligibility for participation in the Retirement Bridge Leave of Absence, or claims for attorneys’ fees. . . . You also agree that this Release covers, but is not limited to, claims arising from the [ADEA], as amended, . . . and any other federal, state or local law dealing with discrimination in employment, including, but not limited to, discrimination based on sex, sexual orientation, race, national origin, religion, disability, veteran status or age . . . . This Release covers both claims that you know about and those that you may not know about which have accrued by the time you execute this Release.

You agree that you will never institute a claim of any kind against IBM . . . including, but not limited to, claims related to your employment with IBM or the termination of that employment or other severance payments or your eligibility for participation in the Retirement Bridge Leave of Absence. If you violate this covenant not to sue by suing IBM . . ., you agree that you will pay all costs and expenses of defending against the suit incurred by IBM . . ., including reasonable attorneys’ fees, and all further costs and fees, including attorneys’ fees, incurred in connection with collection. This covenant not to sue does not apply to actions based solely under the [ADEA], as amended, . . . and any other federal, state or local law dealing with discrimination in employment, including, but not limited to, discrimination based on age and is enforced by the [EEOC].”

iv. Endnote 1 of the agreement explains that “[t]he [ADEA] prohibits employment discrimination based on age and is enforced by the [EEOC].”

v. Prior to signing the release, one of the plaintiffs, Thomforde, asked his supervisor if by signing the agreement he was waiving his right to sue under the ADEA. Thomforde subsequently received an e-mail from the supervisor explaining that, according to a company attorney, the document “is as intended by IBM” and that Thomforde should consult his own attorney, which he later did. Thomforde ultimately decided that he did not waive his ADEA rights under the agreement and signed it. As part of a putative class, he later sued IBM.

vi. Reversing a lower court ruling that the waiver agreement was unambiguous and enforceable, the Eighth Circuit found just the opposite. According to the Eighth Circuit, the inclusion of the “covenant not to sue” in the waiver agreement was confusing, and because the company chose to use legal terminology, it had “a duty to carefully explain” those provisions in the release agreement. The court concluded that the waiver document failed to explain “the limited nature of the exception to the covenant not to sue in light of the release of claims.” Rather, the terms were used in such a way as to suggest they were interchangeable. As a result, a layperson could reasonably, but incorrectly, read the statement, “This covenant not to sue does not apply to actions based solely under the [ADEA],” as an exception to the general release, not just as an exception to the covenant not to sue. Thomforde, 406 F.3d at 504.
vii. The court also was troubled by IBM’s reluctance to provide clarification, indicating that (1) the company had an obligation to do so, and (2) its awareness that the release was in need of clarification underscored the document’s inherent problem:

It seems axiomatic that if an agreement needs clarification, it is not written in a manner calculated to be understood. To rely on the agreement’s direction to seek legal advice, a separate statutory requirement for a valid waiver, see [29 U.S.C.] § 626(f)(1)(E), for clarification of the waiver would nullify the distinct requirement that the agreement be written in a manner calculated to be understood by the participant (as opposed to his attorney). Id. at 504 n.1.

viii. Accordingly, the court concluded that “[g]iven the lack of clarity in the Agreement, and IBM’s declination to tell Thomforde what it meant by the language, we hold that the Agreement is not written in a manner calculated to be understood by the intended participants as required by the OWBPA.” Id. at 504 (citation and footnote omitted).

ix. On August 31, 2006, in a case brought by another group of IBM employees, the U.S. Court of Appeals for the Ninth Circuit, deciding precisely the same question, reached the same conclusion as the Eighth Circuit. See Syverson, supra. Citing the Thomforde court’s analysis, the court in Syverson reasoned:

Without a clear understanding of the legal differences between a release and a covenant not to sue, these provisions would seem to be contradictory; how can an employee bring a suit solely under the ADEA if the employee has waived all claims under the ADEA?

Syverson, supra, 472 F.3d at 1083 (citing Thomforde, 406 F.3d at 503). Thus, the Syverson court also held the release to be invalid under OWBPA’s “manner calculated” requirement.

x. Note: IBM argued that it had the legal right to include a covenant not to sue in the release and needed to do so to protect its right to obtain costs and fees. The company also contended that it was simply complying with the EEOC’s regulation prohibiting releases from “adversely affecting any individual’s right to challenge” the validity of the release. 29 C.F.R. §1625.23(b). Although sympathetic to IBM’s intentions, neither court was persuaded. Thus, employers should be wary of including a covenant not to sue—as well as other legal terminology—in OWBPA-related releases unless they also provide plain-English explanations of the terms used. It may be wise to test the clarity of a proposed waiver on nonlawyers before its implementation.

xi. Further, the release should state that the company will respond to questions; the employee should acknowledge in writing that the employee has been so advised; and the company should have procedures in place for fully responding to employee inquiries. Receiving a series of questions on the same issue should alert the company to the likelihood that the release is not as clear and unambiguous as it needs to be to withstand a legal challenge.

xii. The devil is in the details. As the following cases further demonstrate, plaintiffs are successfully focusing on a variety of technicalities to get releases declared invalid under OWBPA.

d. OWBPA’s Informational Requirements

i. Several court of appeals decisions have tackled another troublesome aspect of OWBPA—its informational requirements.

c. “Decisional Units”

i. OWBPA requires that employers provide information about the ages of discharged and retained workers to employees who are considering releasing potential ADEA claims. 29 U.S.C. §626(f)(1)(A)–(H). Specifically, employers seeking waivers in connection with group terminations must inform the employee as to:
(i) any class, unit or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. 29 U.S.C. § 626(f)(1)(H).

ii. A “decisional unit,” according to the EEOC, is:

that portion of the employer’s organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. The term “decisional unit” has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program. 29 C.F.R. §1625.22(f)(3)(i)(B).

iii. The task of interpreting “decisional unit” and deciding the scope of the information that must be provided was put before the Eleventh Circuit in Burlison v. McDonald’s Corp., 455 F.3d 1242 (11th Cir. 2006).

iv. In that case, employees terminated by McDonald’s as part of a nationwide “restructuring” were offered severance packages in exchange for releases waiving any claims they may have had against the company. McDonald’s had included region-specific information sheets with the releases, which (1) listed the job titles and ages of 208 employees in three regions, (2) identified which of those employees had been selected for discharge and offered severance packages, and (3) identified which of those employees were not being discharged.

v. About two years after they had signed and filed the releases, some of the former employees filed an age discrimination suit against McDonald’s, alleging that the releases failed to comply with OWBPA’s informational requirements concerning “decisional units” and were therefore void. The district court ruled for the employees, interpreting 29 U.S.C. §626(f)(1)(H)(ii) to require that McDonald’s provide job titles and ages of all employees nationwide who were terminated but the ages of only those employees in the same “decisional unit” as the terminated employees.

vi. The Eleventh Circuit disagreed. Noting that the statute as well as the EEOC’s regulations were themselves ambiguous, the court first determined that “the OWBPA’s informational requirements are limited to the decisional unit that applies to the discharged employees.” Id. at 1247. The court then reasoned that its interpretation was consistent with the purpose of the informational requirements.

vii. However, in another case interpreting “decisional units,” Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090 (10th Cir. 2006), the U.S. Court of Appeals for the Tenth Circuit, in its second decision in the same case, again held that releases executed in connection with a RIF were invalid because they inaccurately described the “decisional unit.” The employer’s information sheet had stated that all salaried employees at a particular facility were considered for the termination program when in fact only salaried employees reporting to a particular manager were considered for possible termination. Because of this error, the waivers were declared invalid and the employees were allowed to proceed with their ADEA claims.

viii. Note: The Weyerhaeuser decision is significant for another reason: In its first ruling, the appellate court also struck down the waiver on the ground that it failed to fully describe the “eligibility factors” to the employment termination program. The court held that because the employer did not list the specific factors used in determining how employees would be selected for layoff (for example, specific technical skills, leadership skills, etc.), the release was invalid. See id. Significantly, however, in its second ruling in the case, the court completely omitted this holding.

f. Bottom Line
i. These cases demonstrate how difficult it can be to design a release that will satisfy OWBPA's myriad complex requirements.

ii. To ensure that a release will stand up to judicial scrutiny, employers need to thoroughly understand their obligations under OWBPA, and they must also ensure that employees understand their rights.

g. Plan Out What Each Terminatee Will Be Told, By Whom, And Where

i. Will employees be asked to leave immediately? (May be impossible if WARN Act 60-day notice is required, without incurring liability for 60 days' pay, which will not be consideration for the release of claims under anti-discrimination statutes.)

ii. If outplacement assistance is to be provided, outplacement counselors may be made immediately available to take some of the sting out of the termination and prevent the terminee from venting to the terminating supervisor. (Some companies give that job to personnel or human resources professionals for similar reasons.)

iii. In any event, have the terminators trained in what to expect (stunned silence, anger, violence, confrontation, etc.) and how to handle themselves.

h. Plan The Treatment Of Post-Termination Inquiries

i. Prepare company employees and attorneys to answer questions about the termination from outside sources including unemployment insurance agencies, hostile lawyers, governmental agencies, and potential employers.

(1) The best response usually is to attribute the termination to a RIF. This has the virtue of truth and does not hinder the terminees’ search for their next job.

(2) Pay particular attention to governmental agency investigations. Defenses not raised early will look a lot like pretext if raised in later phases of litigation.

ii. Never badmouth a terminee to potential employers.

(1) Re-employed terminees are less likely to sue and have gone far to mitigate their damages.

(2) Out-of-work former employees are most likely to sue or at least invite governmental agencies to take a look at the RIF to see if any laws have been violated.

APPENDIX 1

Pre-Termination Checklist

I. WHY?

Does it make sense?

Does it seem fair?

Does it seem excessive?

Seriousness of infraction

Length of service

How others have been treated

II. DID THE EMPLOYEE DO IT?

Get their side in writing.
Face conflicts.
Consider mediation or arbitration.
Prepare evidence if needed.

III. REVIEW PAPER TRAIL
Personnel file
Grievance procedure
Other writings

IV. DISPARATE TREATMENT
How have employees been treated in the past for this type of behavior?

V. CONSIDER SETTLEMENT
Valid release
Out-placement

VI. NEUTRAL REFERENCES

VII. REINSTATEMENT

APPENDIX 2
Reduction In Force Checklist

I. UNDERSTAND THE EMPLOYER’S OPERATIONS (WHERE IT’S AT)
   A. Management structure
   B. Departmental structure
   C. Operational structure
   D. Review or create job descriptions and organization charts.

II. UNDERSTAND WHAT THE EMPLOYER WANTS TO BE (WHERE IT’S GOING)
   A. Will there be fewer managers with greater duties?
   B. Will there be fewer levels (for example, group leaders rather than supervisors)?
   C. What will the organization chart look like?
   D. What will new job descriptions look like?
   E. What jobs will be eliminated?
   F. What is the objective of the RIF?
      1. Cost saving
      2. Improved efficiency
      3. Automation
      4. Peter Principal elimination
      5. Going out of a particular line of business
III. DECIDE HOW TO GET THERE

A. Is LIFO (last in, first out) possible?—The safe harbor of seniority
   1. Should employees hired last leave?
   2. Should the last hired in each department or operational unit go?
   3. How is seniority to be measured?
      a. Most recent date of hire by the employer
      b. Length of service in the position or department
      c. Date of entry into the department
      d. Experience in the skill
   4. Can seniority be used for some classes of jobs and not others?
   5. Should terminees be allowed to bump junior employees in other jobs or departments?

B. Should job elimination be used?
   1. Should incumbents be laid off?
   2. Should laid off incumbents be allowed to bump less senior or less skilled in retained jobs?

C. Should the “best” be identified and the “worst” laid off?
   1. Review, rate, and rank candidates and their written records.
   2. Start with those with inadequate performance.
   3. Check and cross-check subjective judgments.
   4. Should bumping be allowed?

D. Avoiding liability by encouraging voluntary quits.
   1. Provide sweetened early retirement options.
   2. Offer exit incentives (severance pay, etc.).
   3. Obtain valid releases:
      a. Knowing
      b. Voluntary
      c. Valuable consideration
      d. Older Workers Benefit Protection Act

IV. PRECHECK THE TENTATIVE SELECTION LIST

A. Check the statistical impact of the RIF on each protected class before and after the RIF.

B. Compare those retained to those let go.

C. Identify potential plaintiffs and weigh their cases carefully, scrutinizing the:
   1. Reasons for the choice
   2. Fairness of the reasons
   3. Paper trail in the employee’s records
4. Reasonableness of the decision makers
5. Confirmation of the choice by other supervisors
6. Credibility of potential witnesses

V. CONSIDER OTHER RISK REDUCTION TECHNIQUES
A. Voluntary quits (exit incentives)
B. Adjustments to cure statistical imbalances
C. Reconsideration of individual cases

VI. CALCULATE THE HIDDEN COSTS
A. Multi-Employer Pension Plan Act (hidden cost of union member RIFs when contributions have been made to Union/Employer Multi-Employer Pension Fund)
B. WARN Act (60 days notice for mass layoff)
C. Other potential sources
   1. Employment contracts
   2. Personnel manual promises
   3. Pension and insurance plan complications
   4. State severance pay laws

VII. FINALIZE AND EXECUTE THE PLAN
A. Start with the voluntary quits.
B. Then do the involuntary.
C. Plan the actual termination procedures (who, when, where, etc.).
D. Rehearse those who will be involved.
E. Be prepared to answer questions that will be raised (“Why me?”).

VIII. ACT TO CUT DOWN LIABILITY AFTERWARD
A. Consider outplacement counseling.
B. Organize help for terminees to get next jobs.
C. Be sure not to hinder terminees’ job searches.
D. Refer all government and hostile inquiries to appropriate counsel who will do the job of replying right the first time.

To purchase the online version of this outline, including editable versions of the checklists, go to www.ali-aba.org.