

Energy Employment Law Group
RIF Best Practices Team



Layoffs Without Liability: Advanced Strategies for Reducing Headcount

Part II - March 4, 2015

Dennis A. Clifford

Jeffrey Ross

Steve Shardonofsky

Energy Employment Law Group
RIF Best Practices Team



Minimizing WARN Exposure



The Basics

The WARN Act is a federal law that:

- Requires **ADVANCE WRITTEN NOTICE** to affected employees and government agencies
- Where enough **EMPLOYMENT LOSSES** arise from
- **COVERED EVENTS** (“plant closing” or “mass layoff” at any “site”)



Cost Of Doing It Wrong

- Two months of pay with benefits per employee
- \$500/day civil penalty up to 60 days (\$30,000)
- Attorneys' fees



Employment Loss

- Termination;
- Layoff (but not a temporary layoff of less than 6 months); or
- Greater than 50% reduction in work hours.
- In limited circumstances, an offer of job transfer does not count as employment loss.



Covered Event: Plant Closing

Plant Closing =

- shutdown of single site of employment,
- shutdown of one or more facilities, or
- shutdown of one or more operating units

Resulting in

- “employment loss” of 50 or more employees (excluding part-time employees and those who have worked less than 6 months in prior 12 months)

During any:

- 30-day period (but must also consider 90 day period)



Covered Event: Mass Layoff

Mass Layoff =

- employment loss (not resulting from plant closing) at single site of employment for:
 - 500 or more employees (excluding part-time employees and those who have worked less than 6 months in past year)
- or
- 50 to 499 employees, if they make up at least 33% of employees at single site of employment (excluding part-time employees and those who have worked less than 6 months in past year)

During any:

- 30-day period (but must also consider 90 day period)



The Counting Period

- 30-Day Rule:
 - Coverage is automatic
- 90-Day Aggregation Rule:
 - Coverage is presumed if within a 90-day period, employment losses occur within the same single site of employment, each of which involves fewer than the number necessary to trigger coverage, but which together exceed the numbers necessary to trigger WARN
 - employer must then demonstrate that employment losses resulted from separate and distinct activity
 - Company of 125 employees lays off 15 employees on 4/10; 20 on 5/15; and 20 on 6/20.



The Counting Period (cont.)

- The 90-day aggregation rule precludes the aggregation of two events if either one is itself large enough to trigger the WARN.
- Best practice: When planning layoffs and possible application of WARN, employer should look 90 days backward and forward.



Top 10 WARN Mistakes

1. Full Time / Part Time. If there are sufficient employment losses – based on counting only “full-time” employees – to trigger WARN, then all employees (**including part-time employees**) experiencing the employment losses as part of the same WARN event are entitled to notice.
2. Double Counting. If an employer has suffered a covered “plant closing,” it should not double count the affected employees when considering whether other employment losses constitute a “mass layoff.”



Top 10 WARN Mistakes

3. “Plant” is somewhat misleading. A “plant closing” can involve the shutdown of a discrete “operating unit” (e.g., departments, product lines, functions at the site).
4. “Closing” is somewhat misleading. The use of a skeleton crew (e.g., for windup or maintenance activity) will not avoid an otherwise covered “plant closing.”



Top 10 WARN Mistakes

5. Timing. WARN notices are effective upon receipt (not postmark date). If mailing, allow sufficient time to ensure that notices are received 60 days in advance.
6. “One or more” A “plant closing” occurs if there is a shutdown of one or more operating units at a single site that results in 50 employment losses. Consider all shutdowns at the site collectively.



Top 10 WARN Mistakes

7. Temporary employees. Temporary employees are counted in determining whether other employees are entitled to notice.
8. Temporary employees. Temporary employees are not entitled to WARN notice if they were hired with an understanding that their employment would be limited to a particular project or undertaking. But they are entitled to WARN notice if they were hired for an indefinite duration.



Top 10 WARN Mistakes

9. Damages Offset. The required backpay and benefits may be offset by any wages paid after the employment loss, or by any voluntary and unconditional payment not legally required.
10. State Law. Some states have “mini-WARN” statutes with different standards.

Energy Employment Law Group
RIF Best Practices Team



Developing Enforceable Severance Agreements



Origins of OWBPA

- In 1990, Congress amended the ADEA by enacting OWBPA to clarify the prohibitions against discrimination on the basis of age and address waivers of rights and claims under the ADEA. 29 U.S.C. § 626(f)
 - EEOC has issued regulations. 29 C.F.R. § 1625.22-23
 - 2009 EEOC guidance / Case law? What case law?
 - Establishes requirements for a “**knowing and voluntary**” release of ADEA claims.
 - Imposes additional **disclosure requirements** when waivers are requested from a group or class of employees in context of voluntary or involuntary RIF.



Requirements for Waiver of Age Claims

1. Write in manner that is clearly understood
2. Refer to rights/claims arising under ADEA
3. Advise employee to consult attorney
4. Provide employee with at least 21 days (45 days in group context)
5. Give employee 7 days to revoke
6. Cannot include rights/claims that arise after waiver is executed
7. Must be supported by consideration
8. Additional requirements for “group” releases



What Information Must the OWBPA List Provide?

1. “Decisional unit”;
2. Eligibility factors for the program;
3. Time limits applicable to the program;
4. Job titles and ages of all individuals who are eligible or selected; and
5. Ages of all individuals in the same job classifications or organizational unit who are not eligible or selected.

Employer Information Disclosure

- Pursuant to the Older Workers Benefit Protection Act, this is a list of the job titles and ages of the employees in the ABC Company's Human Resources Department as of February 24, 2015, who were selected and not selected for termination effective March 1, 2015. ABC Company selected employees for termination on the basis of business needs, job requirements, and comparative skill sets. Selected employees are eligible for severance based on criteria in the ABC Company's Severance Plan.

Job Title	Age as of Date Selected	Age as of Date Not Selected
Area HR MgrEmployment		44, 57
CoordinatorHR		29
AdministratorHR		28, 51
Coordinator - AssocHR		25, 26, 30, 52, 58
Coordinator - IntHR	29, 44	28, 29, 29, 32, 38, 42, 53, 53, 61
Coordinator - LeadHR		49
Coordinator - SrHR		25, 29, 30, 37, 40, 41, 42, 51, 52, 53, 53, 60, 62
HR Generalist I	31, 39, 41, 53, 53, 62	30, 34, 35, 36, 38, 41, 42, 43, 46, 49, 50, 50, 50, 53, 54
HR Generalist II	37, 43, 56	33, 35, 39, 42, 43, 49, 49, 57, 61
HR Representative I		57
HR Representative II	61	35, 41, 48, 50, 59, 62
HR/Payroll Coord – Int		26, 29, 31, 31, 45, 45, 59
HR/Payroll Coord – Lead Lead		48, 66
Manager Division Human Res		33, 47, 47, 53, 55, 60
Sr HR Generalist		34, 40
Vice President HR/A	42, 49, 49, 51, 51, 54, 54, 58, 59, 66, 67	33, 38, 39, 39, 40, 40, 40, 40, 43, 44, 47, 49, 49, 51, 52, 52, 53, 53, 53, 54, 54, 56, 57, 61, 65
Vice President HR/B	36, 52, 53	30, 37, 38, 40, 43, 44, 47, 47, 51, 53, 57, 57, 58, 62



Top 10 OWBPA Mistakes

1. Using Your “Standard” Agreement. A waiver must be written in a manner that can be clearly understood.
 - Avoid technical jargon and long, complex sentences
 - Don’t include both a release and a covenant not to sue without explaining the difference
2. Ignoring The Basics. Strict compliance is required:
 - Must advise employee to consult an attorney
 - Refer to rights or claims arising under the ADEA
 - Time periods
 - Using birth dates instead of ages in disclosure list



Top 10 OWBPA Mistakes

3. Do You Have A “Program”? Whether a “program” exists depends on the facts and circumstances of each case.
- 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 (EEOC Guidance)



Top 10 OWBPA Mistakes

4. The First Set Of OWBPA Disclosure Data You Review Is Probably Wrong. Do not assume the first set of OWBPA disclosure data is correct because it usually is not.
 - HRIS systems are not 100% accurate and information should be updated to prepare OWBPA disclosures
 - Use “mirror” list with names included to review data and make corrections before finalizing OWBPA disclosure list



Top 10 OWBPA Mistakes

5. Identifying The Correct “Decisional Unit”. The class, unit, or group of employees from which the ER chose the EEs who were and were not selected for RIF.
- Consider **org. structure / decision-making process**
 - **Eg:** Employer decides it must eliminate 10% of its workforce at a facility; the **entire facility** is the DU
 - **Eg:** Employer must eliminate 15 jobs and only considers employees in its finance department; the **finance department** is the DU
 - What about a multi-department RIF?
 - What about a multi-location RIF?



Top 10 OWBPA Mistakes

6. Failing to Include Employees Not Selected Or Employees On Leave. Remember to include **all** employees in “decisional unit”.
 - Include employees not selected (e.g., if you considered three departments, but are only making RIFs in one department, employees from all three departments must be included on OWBPA disclosure list)
 - Employees on leave?
 - Overseas employees?



Top 10 OWBPA Mistakes

7. Failing to Conduct HR/Legal Review For Fear Of Enlarging Scope Of Decisional Unit. “Higher level review of termination decisions will not change the size of the decisional unit unless the reviewing process alters its scope.” (EEOC Regs.)
 - OK for HR to monitor compliance with EEO laws
 - OK for regional manager to review termination decisions from more than one facility
 - “However, if the regional manager ... determinates that persons in other facilities should also be considered for termination, the decisional unit becomes the population of all facilities considered”



Top 10 OWBPA Mistakes

8. Including “Claw Back” Or Fee-Shifting Provisions, Or Releasing Claims That Cannot Be Released.
 - “No ADEA waiver agreement ... may impose ... any other limitation adversely affecting [the] right to challenge the agreement. ... [including] provisions requiring employees to tender back consideration received [or] allowing employers to recover attorneys' fees ... because of the filing of an ADEA suit.”
 - Do not include claims that cannot be released such as discrimination charges, unemployment/worker compensation claims, or wage/hour claims



Top 10 OWBPA Mistakes

9. Failing To Include Selection Criteria. Some employers have taken the position that **selection criteria** used to identify employees for RIF need not be included in the releases, as the statute and regulations do not explicitly refer to the inclusion of "selection criteria."
- Several federal district courts have held that an employer must identify – at least in general terms – the criteria used by the employer in selecting individuals for layoff
 - Employers can satisfy their obligations by identifying broad factors (such as job criticality and job performance) in the releases
 - EEOC Guidance appears to suggest this is best practice



Top 10 OWBPA Mistakes

10. Duress, Fraud, And Misstatements. OWBPA waiver will be deemed **invalid** if:

- Employer used fraud, undue influence, or other improper conduct to coerce the employee to sign it
 - Under-disclosure of information
 - In a voluntary program, lack of voluntariness
 - Obtaining release while knowingly not complying with OWBPA
- The disclosure list contains a material mistake, omission, or misstatement
 - Data and information not accurate as of the date shown
 - Inaccurate/sloppy/incomplete description of decisional unit



Top 10 OWBPA Mistakes (Extra Credit)

11. Addressing A Rolling RIF. An involuntary RIF in a decisional unit may take place in successive increments over a period of time. Information supplied should be **cumulative**, so that later terminees are provided ages and job titles/categories for all persons in the decisional unit at the beginning of the program and all persons terminated to date.

Energy Employment Law Group
RIF Best Practices Team



“ERISA-fying” Severance Activity



ERISA Severance Pay Plan Advantages and (Few) Disadvantages

Virtually every employer should adopt an ERISA severance pay plan for severance activity. The multiple advantages significantly outweigh the few disadvantages.



ERISA Severance Pay Plan - Advantages

- 1. ERISA May Already Apply.** ERISA requires an employer to maintain a written plan for a broad array of severance practices, except the most simple. ERISA coverage is broader than many employers realize and can include informal policies and practices.
- 2. Fines for Non-Compliance.** If an employer does not have an ERISA required severance pay plan, the employer can be fined for failing to file annual reports or to comply with other ERISA formalities.



ERISA Severance Pay Plan - Advantages

- 3. Focus on Benefits.** An ERISA plan avoids the risk that a claimant will focus litigation on an employer's statutory noncompliance, rather than on his/her own benefit eligibility.
- 4. Consistency and Flexibility.** An ERISA plan can provide an employer both consistency and considerable flexibility concerning who is eligible for what types and levels of severance pay and benefits.



ERISA Severance Pay Plan - Advantages

- 5. Defined Terms.** An ERISA plan minimizes the risk of paying severance -- or being forced to pay severance -- the employer does not explicitly intend to provide.
- 6. Cheaper Dispute Resolution.** An ERISA plan offers cost-effective dispute management by requiring that any claimant bring a severance claim under the plan's administrative claim procedure, and exhaust all available appeals, before going to court.



ERISA Severance Pay Plan - Advantages

- 7. More Efficient Dispute Resolution.** An ERISA plan's administrative claim procedure provides an efficient way -- before court litigation -- to evaluate severance pay claims, identify problems, correct errors and/or resolve disputes.
- 8. No State/Common Law Claims.** ERISA preempts most state law, so an ERISA plan generally bars state law severance related claims, like statutory claims for discrimination, or common law claims for fraud, misrepresentation, promissory estoppel or breach of contract.



ERISA Severance Pay Plan - Advantages

- 9. Involuntary Deductions.** ERISA may preempt state wage payment laws such as those which would bar an employer from making useful but involuntary deductions from severance pay.
- 10. Damage Limits.** An ERISA plan precludes the award of extra-contractual compensatory and punitive damages which otherwise would be available to a claimant in many state or common law claims.



ERISA Severance Pay Plan - Advantages

11. Administrative Discrimination Charge. An ERISA plan will not bar a claimant from filing a severance related discrimination charge with a government agency. But a plan may provide the basis for requiring that a discrimination claimant exhaust the plan's administrative claim procedure before going to court.



ERISA Severance Pay Plan - Advantages

- 12. Federal Court Forum.** An ERISA plan gives an employer what is often a more balanced forum in severance disputes that go to court because ERISA claims are heard in federal rather than state court.
- 13. No Jury Trials.** An ERISA plan gives an employer greater protection in severance disputes in court because ERISA claims are decided by a judge rather than a jury.



ERISA Severance Pay Plan - Advantages

- 14. Less Discovery.** An ERISA plan can shorten the time and expense of severance related litigation because courts generally limit the scope of discovery to the record from the plan's administrative claims procedure.
- 15. Better Standard of Review.** An ERISA plan can give an employer greater protection in disputes that go to court by requiring that the plan administrator's decision be upheld unless the claimant proves that it was "arbitrary and capricious."



ERISA Severance Pay Plan - Advantages

16. Attorneys' Fees. ERISA allows a court to require a claimant, without a substantially justified position, to pay a prevailing plan administrator's attorneys' fees. Such fees usually are not recoverable in severance related state or common law claims.



ERISA Severance Pay Plan - Disadvantages

- 1. Plan Document and Summary Plan Description.** ERISA requires a written plan and summary plan description. But for severance, they are often the same document.
- 2. Reporting Requirements.** ERISA requires an employer to file an annual Form 5500 if the severance plan covers 100 or more participants.



ERISA Severance Pay Plan - Disadvantages

- 3. Statutory Penalty.** ERISA allows a claimant to recover a statutory penalty if the employer fails to provide requested plan documents.
- 4. Attorney Fees.** ERISA usually requires an employer to pay the attorney fees of a prevailing claimant in a severance dispute. Attorney fees generally are not recoverable in severance related state or common law claims.



ERISA Severance Pay Plan - Disadvantages

5. Increased Expectations. An ERISA plan may increase the expectation that an employer will pay severance, regardless of limiting plan language. Most employers find this expectation manageable, particularly if the employer already offers severance eligibility to a broad range of employees.

Energy Employment Law Group
RIF Best Practices Team



Questions?