REDUCTIONS IN FORCE IN EMPLOYMENT LAW

Second Edition

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BNA Books, *A Division of BNA*, Arlington, VA

Library of Congress Cataloging-in-Publication Data

Lipsig, Ethan.
Reductions in force in employment law / Ethan Lipsig, Mary C. Dollarhide, Brit K. Seifert. -- 2nd ed.
p. cm.
Includes index.
ISBN 978-1-57018-718-6
1. Layoff systems--Law and legislation--United States. 2. Employees--Dismissal of--Law and legislation--United States. 3. Downsizing of organizations--United States. 4. Notice (Law)--United States. I. Dollarhide, Mary C. II. Seifert, Brit K., 1968- III. Title.
KF3471.L577 2011
344.7301'2596--dc22
2011012865

Published by BNA Books
1801 South Bell St., Arlington, VA 22202
bnabooks.com

ISBN: 1-57018-718-6
Printed in the United States of America

Chapter 1

GETTING STARTED

I. Overview

This book analyzes the major U.S. employment-related legal issues (and other important considerations) that arise (1) when an employer is planning or preparing for a work force reduction, (2) in implementing a work force reduction, and (3) in the days and weeks following the announcement and rollout of such a business restructuring.[1] In other words, this publication provides a step-by-step analysis of reductions in force (RIFs) from an employment law perspective.

The substance of this book is not the exclusive concern of employers. Although much of this publication addresses issues that are (or should be) of

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[1]For information about conducting reductions in force outside the United States, see more specialized sources, such as International Labor and Employment Laws (William L. Keller & Timothy J. Darby eds., BNA Books, 3d ed. 2009), and Billie Munro Audia, *Planning a Successful Multijurisdictional Reduction in Force in Europe*, 9 ACCA Docket, at 90 (2002), *available at* http://www.acca.com/vl/resource/v3006 (copy on file with author).

concern to employers, this book also addresses issues of concern to employees, unions, and government or regulatory agencies. Indeed, the objective of this book is to educate the reader, regardless of his or her perspective, on salient employment law issues related to work force reductions, to subject those issues to a thorough analysis, and, where possible, to offer various approaches or strategies that may minimize the adverse impact of RIFs on employees and the communities in which they live, as well as on employers. A working thesis of this treatise is that ill-conceived or ill-executed RIFs ultimately are of little benefit to any of the stakeholders.

This first chapter summarizes, in sequential order, the major considerations that should be considered by employers contemplating a work force reduction.[2] On this note, employers should approach a work force reduction as a means to an end, an organizational restructuring: a reorganization of the way the employer operates, a permanent reduction in the scale of its operations, or the elimination of unprofitable or undesirable operations.[3] The restructuring process itself is not discussed in this book; it has been adequately addressed elsewhere.[4]

Work force reductions reached near-historic levels following the U.S. recession that began in December 2007.[5] For the first three months of 2009 alone, the U.S. Department of Labor Bureau of Labor Statistics reported that 3,979 mass layoffs occurred resulting in more than 700,000 lost jobs[6]—a figure not reflecting job losses effected through other means, such as exit incentives.[7] In India, layoffs even turned deadly, a frightening reminder of the enormous emotional impact layoffs can have on employees.[8]

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[2]*See also* Addendum 1-A at the end of this chapter for a sample checklist of RIF issues.

[3]General Accounting Office, GAO/GGD-95-54, Workforce Reductions: Downsizing Strategies Used in Selected Organizations 16 (1995) (reprinted as Appendix A).

[4]*See, e.g.,* Melvin Katz & Henry Lesser, Acquisitions, Mergers, Spin-offs, and Other Restructurings (1993); Michael Nash, Managing Organization Performance (1983).

[5]*Unemployment Jumps to 10.2 Percent With Loss of 190,000 Jobs in October*, BNA Daily Lab. Rep., Nov. 9, 2009 (noting the December 2007 start of the recession, according to the U.S. Department of Labor Bureau of Labor Statistics); *March Payroll Loss of 663,000 Jobs Pushes Recession Toll to 5.1 Million Jobs, BLS Says*, BNA Daily Lab. Rep., Apr. 6, 2009 (stating that the loss of 161,000 factory jobs in March 2009 meant 1.5 million total jobs were lost since the beginning of the recession, and only 12.3 million manufacturing jobs remained—"the fewest since 1946").

[6]*Extended Mass Layoffs in First Quarter Idled Fewest Workers Since 2007, BLS Says,* BNA Daily Lab. Rep., May 13, 2010.

[7]*See, e.g., 19,000 GM Hourly Workers Choose to Leave by Accepting Buyout, Early Retirement Offers*, BNA Daily Lab. Rep., June 2, 2008 (reporting General Motors Corp.'s announcement that 19,000 hourly employees had accepted offers to leave the company through early retirement and buyout packages; GM offered retirement-eligible employees pension incentives of $45,000 to production workers and $62,500 to skilled trade workers, while non–retirement-eligible employees were offered cash buyouts or early retirement options); *Qwest Offers Voluntary Separations to CWA Workers in Land-Line Business*, BNA Daily Lab. Rep., Mar. 20, 2008 (reporting that Quest Communications International Inc. offered enhanced voluntary buyouts to 14,000 eligible employees in the company's traditional local telephone business partly because of the effect of the slowing housing market on the land-line business).

[8]Rhys Blakely, *CEO Murdered by Mob of Sacked Indian Workers*, Times Online, Sept. 23, 2008, http://www.timesonline.co.uk/tol/news/world/asia/article4810644.ece.

A separate reason for the continued prevalence of work force reductions may be what one researcher has called their "new character."[9] In the past, work force reductions commonly took the shape of large-scale employee job cuts by big companies as a ready way to reduce business costs in the face of a crisis.[10] In more recent years, work force reductions have increasingly morphed into a more strategic and arguably more acceptable—or at least more widely used—business tool, to the point that otherwise financially healthy companies are implementing work force reductions as a proactive way to boost earnings even higher and reduce costs even more.[11] At the same time, employees are relatively more accepting of layoffs than in the past and more understanding about the phenomenon of job cuts, perhaps partly because of the publicity concerning the effects of globalization and worldwide competition, and perhaps partly due to improved employer-employee communications about impending layoffs.[12]

Offshoring, or outsourcing work to lower wage countries or to company facilities outside the United States may also affect domestic job levels. However, studies aimed at quantifying the effects of offshoring on U.S. employment "acknowledge the dearth of actionable data on the topic[.]"[13]. Estimates of the scope and nature of jobs expected to be "lost" to offshoring varies. Some sources contend that a significant number of jobs can, have and will continue to be shipped to other countries.[14] Other sources dispute that the practice of offshoring

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[9]WAYNE F. CASCIO, STRATEGIES FOR RESPONSIBLE RESTRUCTURING, PAPER PREPARED FOR NATIONAL MANPOWER SUMMIT, SINGAPORE, at 2 (Oct. 18, 2001) (copy on file with author).

[10]*Id.* (describing work force reductions in the early 1990s as often involving "large, sick companies trying to save themselves").

[11]*Id.*; *see, e.g., AOL to Lay Off 2,000 Workers Worldwide, Including 1,200 Throughout United States,* BNA DAILY LAB. REP., Oct. 17, 2007 (reporting on Internet service company AOL's elimination of 2,000 jobs worldwide as part of a "realignment" aimed at increasing investment in high-growth areas and scaling back areas not "core" to the company's new business model).

[12]WAYNE F. CASCIO, STRATEGIES FOR RESPONSIBLE RESTRUCTURING, PAPER PREPARED FOR NATIONAL MANPOWER SUMMIT, SINGAPORE, at 2 (Oct. 18, 2001) ("More managers are briefing employees regularly about the economic status of their companies. This raises awareness and actually prepares employees for what might happen to them. To many, the layoffs seem justified because of the slowdown in economic growth, the plunge in corporate profits, and dive in stock prices." (copy on file with author)). See Chapter 8.

[13]Roger J. Moncarz, Michael G. Wolf & Benjamin Wright, *Service-Providing Occupations, Offshoring, and the Labor Market*, MONTHLY LAB. REV., Dec. 2008, at 72 (referencing studies by Forrester Research, McKinsey Global Institute, Deloitte and Touche, and Goldman Sachs); *see also Reports Cite Growth Potential for Offshoring, Limited Data for Measuring Economic Impact*, BNA DAILY LAB. REP., Sept. 23, 2004 (reporting various factors cited by congressional investigators as inhibiting the ability to accurately measure the impact of offshoring on U.S. jobs).

[14]*See, e.g., United States Must Prepare for Offshoring Through Retraining, Education, Blinder Says*, BNA DAILY LAB. REP., Nov. 19, 2007 (reporting on the warning of Alan S. Blinder, former vice chairman of the Board of Governors of the Federal Reserve System, that potentially 40 million jobs, across a "wider spectrum of industries, professional skills, and income categories" than just manufacturing jobs, could be offshored over the next 30 years due to advances in information and communication technologies and the emergence of China, India, and other developing countries supplying cheap labor); *see also BLS Identifies 30 Million Service Sector Jobs, 160 Occupations as Susceptible to Offshoring*, BNA DAILY LAB. REP., Jan. 22, 2009 (reporting that a new study by the U.S. Department of Labor's Bureau of Labor Statistics identified 160 of more than 500 occupations in the services sector (as opposed to manufacturing sector) as susceptible to offshoring, including pharmacists, computer programmers, biochemists, financial analysts, and other professional and related occupations accounting for approximately 20% of total U.S. employment, but noting that

contributes to domestic layoffs[15] In any event, companies considering offshoring to save costs or avoid layoffs should consider the risk of hidden costs that could arise from generating work through foreign countries because those costs could exceed the intended savings.[16]

Yet despite the prevalence of work force reductions in society today, empirical evidence of their benefits to employers remains somewhat mixed.[17] In contrast, the risks of downsizing seem more evident. For example, one report noted that the culmination of research conducted over a 12-year period of large, publicly traded firms showed "no significant, consistent evidence that employment downsizing led to improved financial performance."[18] In another example, an American Management Association/CIGNA study concluded that downsizing causes disability claims to rise and increases the claimed length of disabilities.[19]

Not surprisingly, research shows that work force reductions are most beneficial and effective in accomplishing financial savings and other company goals when they are carried out only after thoughtful, careful analysis of the company's restructuring objectives, and usually after alternative, less drastic steps are first

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the study did not attempt to estimate the number of service jobs that have or may be offshored primarily because reliable measures to gauge the scope of offshoring were lacking: whereas "goods are typically traded through a port of entry and are tracked relatively easily," services "are traded through diverse channels, many of which are difficult to observe"); *Reports Cite Growth Potential for Offshoring, Limited Data for Measuring Economic Impact*, BNA Daily Lab. Rep., Sept. 23, 2004 (summarizing a report prepared by the United Nations Conference on Trade and Development released Sept. 22, 2004 stating that the market for offshoring was expected to grow to $24 billion in 2007 from approximately $1.3 billion in 2002); Scott Austin, *Offshoring Begins to Reveal Hidden Costs*, Miami Daily Bus. Rev., May 6, 2004 ("According to Forrester Research of Cambridge, Mass., U.S. employers plan to move about $136 billion in wages offshore this year, up from $4 billion in 2000. Recent news articles have estimated that 400,000 to 500,000 information technology jobs were lost to outsourcing over the last few years.") Indeed, a Senate bill in 2010 proposes to limit offshoring by, among other things, ending "deferrals for companies that reduce or close a business in the United States and then start or expand a similar one overseas so they can import back the goods to sell domestically." *Senate Sets Cloture Vote on Bill Aimed at Reining in Runaway Plants*, BNA Daily Lab. Rep., Sept. 24, 2010 (referencing Senate Bill 3816).

[15]*See, e.g., Fears of Service Sector Job Losses Due to "Offshoring" Called "Unduly Alarmist,"* BNA Daily Lab. Rep., Feb. 8, 2008 (reporting that a policy brief authored by the Peterson Institute for International Economics had described Mr. Blinder's warnings that 40 million jobs would be offshored over the next 30 years (discussed in footnote above) as "unduly alarmist," due partly to his failure to account for the U.S.'s expected gain of high-skill, high-wage jobs via their export by other countries to the U.S. ("inshoring"), and that such policy brief independently estimated that the total U.S. jobs likely to be shipped to nations like India and China over the next 20 years was 15–20 million, about 40% of which would be in the manufacturing sector).

[16]Scott Austin, *Offshoring Begins to Reveal Hidden Costs*, Miami Daily Bus. Rev., May 6, 2004 (identifying differences in cultures and legal systems, including varying concepts of taxation, that potentially engender hidden costs).

[17]American Management Ass'n, 1996 AMA Survey on Downsizing, Job Elimination and Job Creation 9–11 (1996) (reprinted as Appendix C); *see also* General Accounting Office, GGD-99-57, Federal Workforce: Payroll and Human Capital Changes During Downsizing, at 3 (1999) (providing information to Congress on "why, during a period of downsizing [during fiscal years 1993 through 1997], the federal payroll increased while the number of federal employees decreased").

[18]Wayne F. Cascio, Strategies for Responsible Restructuring, Paper Prepared for National Manpower Summit, Singapore, at 1 (Oct. 18, 2001) (copy on file with author).

[19]American Management Ass'n, 1996 AMA/CIGNA Survey on Organization Staffing and Disability Claims (1996).

tried.[20] The same holds true for governmental employers.[21] In fact, unless a company or government entity has accurately determined whether it has a true need to reduce its employee work force permanently, it is quite common for work force reductions eventually to be undone by rehiring.[22] Many companies eventually rehire the very employees that they terminate in RIF initiatives, or recruit new employees to replace terminated employees, all at significant cost to the company.[23]

A soundly conceived restructuring plan thus is essential to the ultimate success of any work force reduction.

Once a restructuring study is completed and a strategy is developed, the next step is its implementation, as discussed below.

II. ESTABLISHING OBJECTIVES AND CONSTRAINTS

After a company develops an appropriate restructuring plan, the first step in its work force reduction process is to identify downsizing objectives and constraints: Which positions and which locations in the company will be affected? How many positions will be eliminated? What criteria will be used to determine who will be offered voluntary exit incentives or who must be laid off? How rapid must implementation be? How much is the employer able or willing to spend to effect the RIF? Are any approaches mandated or prohibited by law or by the employer's philosophy, traditions, contractual commitments, or other concerns?[24]

Employers cannot craft a sensible approach to resolving overstaffing problems until they first identify all material objectives and constraints.

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[20] WAYNE F. CASCIO, STRATEGIES FOR RESPONSIBLE RESTRUCTURING, PAPER PREPARED FOR NATIONAL MANPOWER SUMMIT, SINGAPORE, at 1 (Oct. 18, 2001) (copy on file with author) ("Performance improvement appears to depend on the *reason* for the downsizing. . . . [S]imply laying off employees to improve financial performance may not lead to the intended improvement in a firm's financial performance if the layoffs are not accompanied by thoughtful restructuring of the firm's assets.").

[21] *See* GENERAL ACCOUNTING OFFICE, GGD-99-57, FEDERAL WORKFORCE: PAYROLL AND HUMAN CAPITAL CHANGES DURING DOWNSIZING, at 6 (1999) (stating its finding "that a lack of adequate strategic and work force planning during initial rounds of downsizing by some agencies may have affected their ability to achieve organizational missions") (reprinted as Appendix B); *cf. USPS Cut 88 Million Work Hours During First Three Quarters of 2009, Service Says,* BNA DAILY LAB. REP., Aug. 7, 2009 (stating that the U.S. Postal Service reduced work hours by 88 million work hours during the first three quarters of fiscal year 2009, but despite such cost-cutting efforts, ended its third quarter with a net loss of $2.4 billion).

[22] GENERAL ACCOUNTING OFFICE, GAO/GGD-95-54, WORKFORCE REDUCTIONS: DOWNSIZING STRATEGIES USED IN SELECTED ORGANIZATIONS, at 18–19 (1995).

[23] WAYNE F. CASCIO, DEPARTMENT OF LABOR, THE GUIDE TO RESPONSIBLE RESTRUCTURING (1995), *at* http://www.rotman.utoronto.ca/~evans/teach363/downsize/respres.htm (noting that "[r]ecruiting, selecting, and training those new hires comprise about one-third of their annual first-year salaries") (citation omitted).

[24] *See, e.g.,* BNA PENS. & BEN. DAILY, Oct. 10, 1995 (quoting Secretary of Labor Robert B. Reich as encouraging investors to consider a company's layoff practices in making investment decisions).

III. Planning the Work Force Reduction

Once an employer has established a restructuring plan and identified its downsizing objectives and constraints, the next step is implementation planning. For many employers, the best way to accomplish this is to charge a special management committee with the planning and implementation of the RIF. This committee, among other things, would:

- Establish an overall communications strategy for explaining the restructuring and resultant RIFs to employees, customers, suppliers, and the general public.[25] (Frequent and open communications between employees and employers about the downsizing process generally are essential, along with employee counseling, outplacement assistance, and retraining.)[26]
- Establish hiring and promotion freezes at units that may undergo RIFs, to the extent appropriate.[27]
- Determine the RIF approach to be taken.[28]
- Supervise the design of new RIF benefit programs, such as exit incentive or severance pay plans.[29]

Such a committee would use an analytic approach similar to the one outlined in the next section, with appropriate modifications to reflect unique circumstances.

Comment 1.1

Ideas for Employers Interested in Controlling Disability and Workers' Compensation Claims

It is common for employers to see a spike in workers' compensation and disability benefit claims in connection with a work force reduction, as documented by the American Management Association/CIGNA survey on Organization Staffing and Disability Claims (1996). The following steps may help employers to reduce the incidence of these types of claims:

- Communicating work force reductions in a candid and humane fashion.
- Using employee assistance plans.
- Providing outplacement assistance.
- Remembering to deal with the anxiety experienced by the "survivors."

continued

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[25] See Chapter 8.

[26] General Accounting Office, GAO/GGD-95-54, Workforce Reductions: Downsizing Strategies Used in Selected Organizations, at 5 (1995) (reprinted as Appendix A).

[27] See Chapter 2 §VI.B.

[28] See Chapter 3.

[29] See Chapters 4 and 6.

Comment 1.1—*Continued*

- Keeping the period between notice of termination and actual termination short to reduce the opportunity for real (or feigned) on-the-job injuries.
- Preserving evidence of plant or facility condition, such as photographs.
- Testing the plant—e.g., for air quality and safety rule compliance—and maintaining records.
- Maintaining accurate records of possible work-related exposure to substances or noise.
- Keeping records, to the extent lawful, of employees' physical conditions prior to the commencement of employment and during employment.
- Making free, job-related physical examinations available to employees in connection with their termination and retaining records of the results; these records may help employers to defend against or disprove later pre-termination injury claims.
- Preserving any other useful records.
- Including a representation in RIF releases that employees are asked to sign to the effect that the signer has not suffered any as-yet-unreported, work-related injury.

A more Draconian step used by some employers is to discontinue disability plan eligibility once employees are notified of a layoff, or even when the prospect of layoffs becomes evident.

IV. SELECTING AN APPROACH

The next step in the process of implementing work force reduction is for the employer to select the method it will use to address overstaffing. Common methods include the following, sometimes in combination:

- Freezing or reducing hiring in affected positions, letting natural attrition eliminate the surplus.
- Reducing hours per shift or workdays per week, or implementing a temporary layoff for lack of work.[30]
- Transferring or redeploying surplus employees to other positions that need to be filled.
- Some or all of the above, plus either (1) offering exit incentives to encourage voluntary attrition (such as early retirement enhancements),[31] or (2) permanently laying off surplus staff.[32]

[30]See Chapter 19, discussing when reducing pay because of reduced hours turns an employee who is exempt from the Fair Labor Standards Act's wage/hour requirements into a nonexempt employee.

[31]See Chapter 3.

[32]See Chapter 2.

- Some or all of the above, but (1) with exit incentives being followed by a permanent layoff, if needed,[33] or (2) with exit incentives being offered to employees who are simultaneously being targeted for possible permanent layoff.[34]

As noted, reducing work hours can be an alternative to layoffs, as was the case when bargaining unit nurses at Brockton Hospital (Massachusetts) agreed to reduce their hours to avoid layoffs, with each nurse having the option of choosing a permanent reduction in hours or a flexible reduction under which he or she would work a minimum number of hours but be on call for additional hours.[35] One of the stated purposes of the plan was to preserve full health benefits for all nurses. For just that reason, such an approach almost certainly would be more costly to an employer than a layoff, but this ignores a layoff's hidden costs—its adverse effect on morale, loss of corporate knowledge and corporate memory, and potential litigation risks, among others.

Further, depending upon the state laws under which the employer is operating, there may be legislation available to help employers to reduce hours (and thus costs) but avoid having to implement a work force reduction. A relatively uncommon method for possibly preventing a layoff are the "short-time compensation" (STC) programs authorized by federal legislation passed nearly 30 years ago.[36] Since then, 20 states have implemented some version of STC programs (with varying program names).[37] Conceived as a means of providing an alternative to layoffs in times of temporary economic downturns, these programs enable an employer that otherwise may be forced to lay off a portion of its work force instead to apportion work reductions among its broader work force. The affected employees are able to receive unemployment insurance benefits on a pro rated basis commensurate with the extent of their partial layoff.[38] For example, rather than lay off 20 percent of its employees, an employer might reduce the work hours of all of its employees by 20 percent. Generally, for the period of the reduced schedule, such employees would then be able to receive 20 percent of the unemployment benefits to which they would otherwise be entitled had they suffered a complete job layoff. In the absence of STC programs, workers generally are not entitled to unemployment insurance benefits for partial layoffs.[39]

STC programs have some laudable aspects. They enable employers to retain valuable employees in times of temporary financial constraints, offer flexibility to

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[33]See Chapter 3 §II.A.

[34]See Chapter 3 §II.B.

[35]BNA Pens. & Ben. Daily, Mar. 12, 1996.

[36]Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, §194, 96 Stat. 324 (1982).

[37]Stephen Walsh et al., Berkeley Planning Associates, & Karen Needels, et al., Mathematica Policy Research, Inc., *Evaluation of Short-Time Compensation Programs Final Report*, at 1–2 (Mar. 1997) (reporting to the U.S. Department of Labor pursuant to contract to conduct a 2-year, $550,000 study of 17 active state STC programs); *see also* Mary Ann Wyrsch, Director Unemployment Insurance Service, U.S. Department of Labor Employment and Training Administration, *Directive: Unemployment Insurance Program Letter No. 43-94* (Aug. 26, 1994) (asking all State Employment Security Agencies to participate in study) (the written directive is available at the Department of Labor's Web site at www.ows.doleta.gov/dmstree/uipl/uipl94/uipl_4394.htm).

[38]Diane L. Cadrain, *State Work Sharing Programs: Easing the Pain of Layoffs*, 21 Emp. Alert 1, Mar. 26, 2004.

[39]*Id.*

employers in adjusting employment to their demands, enable companies to employ more employees, avoid disruption in business or production processes, reduce the costs of hiring and rehiring, and maintain employee morale.[40] Yet, although all 50 states participate in the unemployment insurance system, approximately only one-third have STC programs,[41] and until relatively recently, STC programs were rarely used,[42] apparently in part because employers are unfamiliar with STC programs.[43] More recently, such programs have garnered increased attention, even at the federal level, with more states moving toward establishing such programs.[44]

With respect to the other methods available to employers for addressing overstaffing, attrition and hiring freezes generally are not effective short-term methods for employers to achieve significant work force reductions.[45] Instead, a high percentage of large employers use voluntary incentive programs and job transfers; permanent layoffs are usually the tool of last resort.[46]

V. Layoff Selection Issues

Significant high-risk issues arise for employers when determining who will be permanently laid off, especially when layoff selections are based on performance.[47] Chapter 2, Section VI., sets forth detailed procedures for employers to consider when making selective layoff decisions.[48] If followed, these procedures should help minimize these risks to employers.

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[40]Stephen Walsh et al., Berkeley Planning Associates, & Karen Needels, et al., Mathematica Policy Research, Inc., *Evaluation of Short-Time Compensation Programs Final Report*, at 5–10 (Mar. 1997).

[41]Cadrain, *State Work Sharing Programs: Easing the Pain of Layoffs*, at 1, 3 (noting that the following states have enacted legislation establishing STC programs: Arizona, Arkansas, California, Connecticut, Florida, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, New York, North Dakota, Oregon, Rhode Island, Texas, Vermont, and Washington).

[42]The programs in Illinois and Louisiana have either expired or are dormant. *See* Walsh & Needels, *STC Programs Final Report*, at 2–3, n.2.

[43]*Id.* at 1–2.

[44]*See* Christine Vestal, *Work Shared, Jobs Spared*, http://www.stateline.org/live/details/story?contentId=475186 (last visited June 26, 2010) (reporting that seven states—Colorado, Hawaii, Ohio, Oklahoma, New Hampshire, New Jersey, and Pennsylvania—are considering legislation authorizing STC programs; that New York's Shared Work plan increased seven-fold since 2007, involves more than 2,300 business and saved 11,000 jobs in 2009; and that proposed federal legislation would fund state STC programs and simplify program rules).

[45]General Accounting Office, GAO/GGD-95-54, Workforce Reductions: Downsizing Strategies Used in Selected Organizations, at 4, 27 (1995).

[46]*Id.* at 25–27, 31.

[47]*See, e.g., Sprint Nextel Agrees to Pay $57 Million to Settle Age Bias Claims Related to Layoffs,* BNA Daily Lab. Rep., May 21, 2007 (stating that telecommunications company Sprint Nextel Corp. entered into a settlement agreement providing $57 million to older workers, laid off in a series of layoffs occurring from 2001 to 2003, who claimed that they were selected for layoff based on their age, and that the company's performance evaluation system had a disparate impact on older workers, who disproportionately received lower rankings than younger employees; pretrial discovery was extensive: 13 sets of interrogatories, 14 sets of document requests resulting in the production of 1.5 million pages of documents, and depositions of more than 200 Sprint managers, officials, and employees).

[48]See Chapter 2 §VI.

As discussed more fully in Chapter 2, Section IV., one of the chief issues in any layoff is whether a protected group's (e.g., African Americans or older workers) percentage composition of the relevant work force will be significantly decreased by a layoff, especially a performance-based layoff. If so, an inference of illegal discrimination against that protected group may arise and the employer, if challenged, must be able to show that valid reasons, not impermissible discrimination, justified its layoff selections.[49] This is often difficult to do, in part because routine, periodic performance evaluations are generally badly inflated.

Practical experience also demonstrates that nearly every unmonitored layoff of an employee for performance-based reasons will have an often wholly unintentional, disparate impact on older workers, thereby potentially violating age discrimination laws. Why is this? At some age (be it 40 or 90), age itself will cause a person's performance to decline. In addition, older workers frequently are more highly paid than their younger counterparts because they have more seniority. It is this combination of relatively high pay[50] and declining performance that often causes older workers to be disproportionately selected in unmonitored, performance-based layoffs.

Employers can avoid a layoff that has a significant disparate impact on any protected group by conducting pro forma tests for disparate impact on protected groups before finalizing layoff selections, with layoff selections being appropriately modified based on the results.[51] Disparate impact testing normally should be an integral part of an employer's layoff selection procedures, despite the potentially significant data collection and data processing burdens testing entails. Laid-off employees frequently request, in later litigation, copies of the employer's data related to the disparate impact analysis process. For precisely this reason, employers often conduct such analyses under the supervision of an attorney in efforts to shield the data under the attorney-client privilege.[52] (At this point, because of concerns over disparate impact or, more cynically, because employers often discover that they cannot safely lay off the employees on their proposed "surplus employee" lists, many employers elect to offer voluntary exit incentives, especially retirement-type incentives, before resorting to performance-based selective layoffs.)

Other layoff selection considerations for employers include:

- Identifying any employment contract, labor contract, layoff policy, or other legal constraints on the proposed layoff.[53]
- Establishing the criteria to be used in making layoff selections.
- Avoiding (or at least carefully assessing the risk of) the selection for layoff of individuals who deem themselves to be whistleblowers, those who have made complaints (especially recent) about some aspect of their employment, or persons about to vest in pension or retiree health benefits.[54]
- Dealing with "bumping" (i.e., permitting more senior employees who are laid off to take the jobs of less senior employees who would otherwise be

[49]See Chapter 2 §IV.A.

[50]See Comment 2.2 in Chapter 2 §IV.C.2. (discussing the use of salary as a layoff criterion).

[51]See Chapter 2 §VI.F.

[52]See Chapter 2 §IV.C.3.

[53]See Chapter 2 §§II. and III.

[54]See Chapter 2 §VI.

retained). Bumping prolongs the downsizing process and creates uncertainty and chaos, but it can result in a more skilled work force because more experienced employees will displace less experienced ones.[55] The Age Discrimination in Employment Act (ADEA) does not require employers to use bumping when implementing work force reductions.[56]

Notwithstanding all these issues, most employers ultimately do not find that legal constraints materially interfere with a work force reduction.[57]

VI. WARN ACT REQUIREMENTS

In many plant closing or layoff situations, the federal[58] Worker Adjustment and Retraining Notification Act (WARN Act)[59] requires employers to give 60 days' advance notice to employees, bargaining representatives, and local government officials. If this WARN Act notice is not given, employees can recover pay and benefits for the period during which notice is not given, up to a maximum of 60 days. Conversely, if an employer gives employees a paid leave with benefits in lieu of notice, there should be little, if any, damages recoverable by these employees, even if this practice violates the WARN Act, which seems unlikely.[60]

Therefore, whether and when an employer must give WARN Act notices is one of the first things an employer should consider in any RIF situation. If there is insufficient time to give WARN Act notices, the employer should explore ways of minimizing its liability. For example, it may be possible to have severance benefits do double duty as WARN Act paid-leave-in-lieu-of-notice.[61]

VII. EXIT INCENTIVES: AN OPTION

Employers often find it appropriate to offer exit incentives in lieu of, or in advance of, a layoff. Organizations of all types have found exit incentives to be an effective RIF approach. For example, in the mid-1990s the federal government offered exit incentives of up to $25,000 in response to which about 70,000 employees voluntarily resigned or retired. President Clinton praised the program as a success; he reported that the buyouts were "targeted to reduce the

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[55] GENERAL ACCOUNTING OFFICE, GAO/GGD-95-54, WORKFORCE REDUCTIONS: DOWNSIZING STRATEGIES USED IN SELECTED ORGANIZATIONS, at 23 (1995).

[56] Anderson v. Consolidated Rail Corp., 297 F.3d 242, 250, 90 FEP Cases 186 (3d Cir. 2002) (stating that the "ADEA is not a bumping statute"); Earley v. Champion Int'l Corp., 907 F. 2d 1077, 1083, 53 FEP Cases 968 (11th Cir. 1990) (stating "nothing in the ADEA requires that younger employees be fired so that employees in the protected age group can be hired") (citation omitted). See Chapter 2 §VI.A.

[57] GENERAL ACCOUNTING OFFICE, GAO/GGD-95-54, WORKFORCE REDUCTIONS: DOWNSIZING STRATEGIES USED IN SELECTED ORGANIZATIONS, at 23 (1995).

[58] Approximately 60% of the states have adopted some form of similar plant closing/mass layoff laws. Because the federal WARN Act specifically states that it does not preempt state law requirements, state laws may create different (i.e., more stringent) obligations for employers operating within their borders. See Chapter 10.

[59] See Chapter 10.

[60] See Chapter 10 §§V.D. and VI.

[61] See Chapter 10 §V.D.1.

layers of bureaucracy and micro-management that were tying Government in knots."[62] President Clinton stated that "we expect to buy out another 84,000 workers through 1997."[63]

The classic exit incentive strategy is where an employer offers generous retirement benefit enhancements or severance payments to persons who voluntarily terminate during a "window" period of one to three months, with the looming threat of a subsequent layoff with lesser (or no) benefits if there is insufficient voluntary attrition.[64] This approach is especially common when a selective performance-based layoff would otherwise be utilized, because the group targeted for layoff will usually consist disproportionately of older workers whom an employer cannot lay off safely. Exit incentives also are in order if the employer's traditions would be undermined by layoffs, its employment policies or contracts preclude layoffs, or morale issues are paramount.

Deciding who should be offered an exit incentive is an especially troublesome issue for employers because it is unsafe to offer them only to people who otherwise would be laid off (after all, doing so would likely be a constructive layoff). This means that employers will have to offer exit incentives to some employees whom the employer wishes to retain, some of whom may decide to take the incentives and leave. It is these very employees, after all, who are most likely to have other job alternatives available.

Hence, an employer should carefully consider exit incentive program targeting, and it should consider retaining the right to reject applicants, where lawful (it is probably unlawful to retain such discretion with respect to qualified retirement plan–based exit incentive plans).[65]

In addition to difficult targeting issues, thorny employment discrimination issues occasionally confront employers, such as whether exit incentive plan eligibility can be limited to older workers or to workers in a particular age range (e.g., ages 50 to 60). The former is generally permissible, but the latter is questionable (although benefits often can be lawfully structured principally to benefit employees in particular age ranges).[66]

Difficult tax law-related eligibility issues also can arise when employers pay exit incentives from a tax-qualified retirement plan. For example, if the eligible group is disproportionately highly compensated, discrimination in favor of highly compensated employees could endanger plan qualification.[67]

VIII. Determining the Benefits to Be Offered

Next in the sequence of the layoff process is the employer's determination of what benefits it will offer to laid off employees. This consideration begins with a determination of what benefits, if any, would be provided under existing plans or policies, such as severance benefits or Consolidated Omnibus Budget Reconciliation Act (COBRA) health coverage continuation.

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[62] BNA Pens. & Ben. Daily, Apr. 17, 1995.

[63] *Id.*

[64] See Chapter 3 §II.A.

[65] See Chapter 13 §II.C.3.

[66] See Chapters 3 §IV. and 11 §§II.B., V., and VI.

[67] See Chapter 13 §II.H.

If these benefits are insufficient, the next step is a determination of how they should be supplemented or superseded. Typical benefits include severance pay (paid in a lump sum, as post-termination salary continuation, or in the form elected by the employee[68] or by the employer), retirement benefit enhancements,[69] Social Security supplements,[70] health coverage,[71] vesting of pensions or stock options, and outplacement assistance.[72] Salary continuation usually is accompanied by group insurance benefit continuation. Occasionally, salary continuation is made contingent on an employee's inability to find new work, although this can be hard to enforce. As a practical matter, executives tend to receive severance pay for a longer period than other groups of employees, and are also more likely than such other employees to receive benefit continuation and outplacement assistance.[73] This is hardly surprising given that two of the primary factors found to influence the value of a severance package are the size of the company and the employee's corporate rank.[74] What may be somewhat surprising, however, is the finding that more than half of lower-level employees are afforded benefit continuation following layoffs.[75]

In any case, before deciding on new benefits, an employer must, of course, consider how much it can spend and the financial statement impact of the proposed package.[76]

Benefits offered under a qualified retirement plan are a special case, because offering such benefits often raises highly complicated legal issues under the Internal Revenue Code and the Employee Retirement Income Security Act of 1974 (ERISA), issues that employers generally take very seriously.[77] These issues include the legality of the proposed benefit itself (e.g., qualified plans are not supposed to pay severance-type benefits),[78] possible discrimination in favor of highly paid employees,[79] the so-called serial amendment issue,[80] and the degree of discretion that can be retained in approving applications to participate and in scheduling termination dates.[81]

The Internal Revenue Code normally has little impact on severance plans even though ERISA usually applies to such plans.[82] Severance plans often are operated in total noncompliance with ERISA, even though litigation arises with respect to severance plans with alarming regularity.[83]

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[68]But see Chapter 13 §IV. (discussing the adverse tax consequences that result from certain benefit elections).

[69]See Chapter 4 §III.

[70]See Chapter 4 §III.E.

[71]See Chapter 4 §II.B.

[72]See Chapters 4 §II.E. and 7.

[73]*See Personal Rank, Company Size Cited as Key Factors in Severance Benefit Value*, BNA DAILY LAB. REP., June 27, 2002 (summarizing results of survey in March 2002 of 566 U.S. employers conducted by the New York firm of Mercer Human Resource Consulting).

[74]*Id.*

[75]*Id.*

[76]See Chapter 6 §VI.

[77]See Chapters 12 and 13.

[78]See Chapters 12 §VI. and 13 §II.A.

[79]See Chapter 13 §II.H.

[80]See Chapter 13 §II.C.2.

[81]See Chapter 13 §II.C.3.

[82]See Chapter 12 §II.

[83]See Chapter 17.

In considering whether to offer salary continuation, employers should not overlook the extra Federal Insurance Contributions Act (FICA) taxes that it often generates. For example, a lump-sum severance benefit will not trigger FICA taxes if the employee has already reached the Social Security wage base, but spreading those payments out past the end of the year in which benefits commence will result in FICA taxation. Because there is no longer a Medicare wage base, this FICA taxation issue arises solely with respect to the Social Security component of FICA taxes.[84]

IX. When Releases Are Required

As a general proposition, employers are often guided to pay severance or exit incentive benefits only to employees who execute a carefully crafted release.[85] The reason for this advice is the recurrent situation in which employees take the money—including exit incentives—and then sue the employer for constructive discharge or other assorted wrongs.[86]

However, there are two situations in which employers should not require releases. The first is when employees are merely being paid already-promised severance benefits that were not conditioned on releases (although employers can address this situation by timely amending the existing severance plan to require releases or replacing the existing plan with a new plan that requires releases).[87] The second situation in which employers should not require releases is when the benefits being offered are small: A release requirement may cause affected employees to inventory their possible causes of action or to consult lawyers; thus, employers generally want to offer to employees consideration for the releases that is substantial enough to persuade virtually all affected employees to sign a release.

Some of the most important release considerations for employers involve the ADEA. Employers are especially concerned with obtaining an ADEA release because age discrimination allegations are a very real possibility in any RIF situation. However, the Older Workers Benefit Protection Act (OWBPA) amended the ADEA to impose substantial conditions on the availability of ADEA releases, which lessens the feasibility of employers seeking them.[88] For example, the OWBPA normally requires employers to give employees terminating employ-

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[84]See Chapter 15.

[85]See Chapter 5.

[86]*See, e.g.,* Kinney v. Hamilton Partners, No. 03 C 3905, 2004 WL 765882 (N.D. Ill. Apr. 7, 2004) (granting summary judgment to employer sued by former employee who had executed a written release after taking the 21-day consideration period; the release itself was only two pages long and had an express acknowledgement before plaintiff's signature stating plaintiff had read and understood terms of release; plaintiff actively negotiated terms of release for two days and succeeded in getting himself more generous benefits; and plaintiff kept all money paid to him under the release, including $12,400 in severance pay); Meredith v. Navistar Int'l Transp. Corp., 935 F.2d 124, 126, 13 EB Cases 2715 (7th Cir. 1991) (stating that "[n]ot wanting to let Navistar's good deed [of voluntarily paying severance benefits to an employee who had voluntarily retired] go unpunished, Meredith sued Navistar under ERISA").

[87]See Chapters 5 §IV.A., Comment 5.1, and 16.

[88]See Chapter 5 §V.

ment in a RIF certain elaborate demographic statistics designed to reveal any disparate impact on older workers.[89] After the employer delivers this data and the form of the release, an employee is entitled to have at least 45 days to consider the release and at least 7 additional days to revoke the release after execution. In addition, the release must be written in simple-to-understand language and the employer must advise the employee in writing to consult an attorney.[90]

These requirements can cause significant problems for employers. In some cases, the census data required to be disseminated in order for the ADEA releases to be valid may reveal problematic patterns of disparate impact (in which case, the employer may need to reconsider its selection decisions). In other cases, the data may be harmless, but may be too costly or too difficult for the employer to compile. For these reasons, some employers have excluded ADEA claims from the releases they have sought (although this approach should be used with caution).

X. IMPLEMENTATION ISSUES

Common issues that an employer must consider in implementing a work force reduction include:

- Keeping the work force reduction confidential until announced.[91]
- Staffing the work force reduction implementation team and allocating its responsibilities.
- Addressing timing issues.
- Preparing and maintaining the implementation schedule (which can be an essential document in complex situations).
- Training supervisors.[92]
- Communicating the work force reduction.[93]
- Considering the impact of the work force reduction on existing programs (e.g., will a partial termination of a retirement plan occur?).[94]
- Considering the need for new or revised documents and administrative forms.
- Addressing administrative matters, such as document preparation, printing, distribution, collection, processing, and retention.
- Integrating the work force reduction with existing employee termination procedures.
- Documenting the voluntary nature of resignations or retirements under an exit incentive plan.[95]
- Offering and arranging for outplacement for laid off employees.[96]

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[89]See Chapter 5, Addendum 5-A, for a sample employer's OWBPA disclosure letter.
[90]See Chapter 5 §§V.B. and F.
[91]See Chapter 8 §II.
[92]See Chapter 8.
[93]*Id.*
[94]See Chapters 13 §II.E. and 17 §VI.
[95]See Chapter 3 §V.D.
[96]See Chapter 7.

XI. Post-Implementation Actions

Although thoughtful planning and careful implementation of a work force reduction obviously is critical, post-downsizing employee relations issues are in many respects more important. Work force reductions generally adversely affect employee morale. Hence, employers should explore ways of helping employees to put the work force reduction in the past, something that may be difficult or impossible if they fear the possibility of future work force reductions. If possible, employers should make efforts to allay such fears.[97]

In addition, as noted at the outset of this chapter, it is not uncommon for employers to hire employees to fill the jobs taken by persons who were laid off. Aside from the fact that this could very well undermine any cost-cutting objective that prompted the layoff to begin with, this practice also has the potential to make the layoff look like a sham. In particular, if such rehiring occurs shortly after a layoff, the layoff may well be regarded as pretextual and there will be a heightened risk of employment litigation. For this reason, employers should impose a hiring freeze of at least six months' duration following a layoff, absent unexpected business circumstances.[98] After that time, or if more immediate rehiring becomes necessary, employers should consider recalling laid off employees or at least giving them hiring preference.

XII. Final Thoughts

Although there is no escaping the emotional and often depressing aspects of a work force reduction, when employers roll out a sensible, well-planned program, and ensure that it is properly implemented and soundly communicated, such steps will minimize these negative factors and materially contribute to long-term, positive employee morale and organizational efficiency and competitiveness. Conversely, a program that is poorly conceived or badly implemented can be counterproductive.[99]

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[97] See Chapter 8 §V.

[98] See Chapter 2 §VI.B.

[99] *See, e.g.,* General Accounting Office, GAO/NSIAD-98-161, Defense Acquisition Organizations: Status of Work Force Reductions 2 (1998) (concluding in report to Congress that while the Department of Defense was on track to reduce successfully its acquisition work force by 25% between 1995 and 2000, "potential savings from these reductions cannot be precisely tracked in DOD's budget," and "some of the potential savings from acquisition workforce reductions may be offset by other anticipated costs," like contracting with private companies to do the work previously performed by the laid off employees, or "substituting one workforce for another") (http://www.globalsecurity.org/military/library/report/gao/nsiad-98-161.htm); *Minnesota Early Retirement Program Cost More Than It Saved, Report Says*, BNA Pens. & Ben. Daily, Mar. 31, 1995 ("The incentives were offered without any study as to whether they would produce cost savings or any attempt to target them toward governmental units or agencies that were expected to lay off employees. . . .").

Addendum 1-A
RIF Issues Checklist

The checklist below summarizes many of the key points that should be considered in the RIF planning process. Some issues have multiple parts.

The importance of the issues raised in this checklist will be quite varied, and the relative weight accorded to certain issues will depend on individual circumstances.

Some issues will require a separate memo or extensive discussions; others may be resolved fairly quickly, with a simple "yes" or "no."

Finally, the answers to some of these questions may require legal advice (e.g., the WARN Act issues, disparate impact analyses). In those instances, an employer must take careful steps if communications on such issues will be protected from disclosure by legal privileges.

A. Objectives

1. Why is a RIF needed? ____________________
2. Are jobs to be redefined or eliminated? Y ___ N ___
3. From which areas and positions? ____________________
4. Based on what criteria? ____________________
5. In what time frame? ____________________
6. How many employees will be displaced? ____________________
7. Is retention until a scheduled date important? Y ___ N ___
8. What RIF benefits can and should be provided? ____________________

B. Alternative Approaches

1. Hiring freezes
2. Transfers
3. Job sharing or reduced hours
4. Temporary shutdowns
5. Voluntary leaves of absence
6. Exit incentives
7. Layoffs
8. Exit incentives followed by layoffs
9. Simultaneous exit incentives and layoffs
10. Other means, such as a retention bonus or pay cuts

C. Layoffs

1. Is there a demonstrable economic or other business need to lay off employees? Y ___ N ___
2. Is collective bargaining necessary? Y ___ N ___
3. Are WARN Act notices necessary? Y ___ N ___
   Is there time to give WARN Act notice? Y ___ N ___
   Has a paid-leave-in-lieu-of-notice strategy been considered? Y ___ N ___

4. Who will select positions for elimination or consolidation?______________
5. Who will select employees for layoff? ______________________________
6. What criteria will be used for layoff decisions? ______________________
7. What procedural safeguards will be established? ______________________
8. Will bumping or other job transfer opportunities be offered? Y ___ N ___
9. Will the layoff breach express or implied employment contracts, the covenant of good faith and fair dealing, employee handbooks, labor contracts, layoff policies, or past practices? Y ___ N ___

   Is the employer's layoff policy properly structured? Y ___ N ___
10. Is there a legitimate basis for each proposed selection? Y ___ N ___
11. Will the layoff impact whistleblowers, litigious employees, or persons whose pension or retiree health benefits are about to vest? Y ___ N ___

    Will it raise other public policy concerns? Y ___ N ___
12. Will the layoff affect workers on maternity, family, medical, military, or other leaves? Y ___ N ___
13. Will the layoff have a statistically significant adverse impact on protected group members? Y ___ N ___
14. Will the layoff have any collateral impacts, such as triggering multi-employer pension plan withdrawal liabilities or causing a partial termination of a qualified retirement plan? Y ___ N ___

D. Exit Incentives

1. Does the desired layoff present legal risks sufficient to warrant offering exit incentives instead? Y ___ N ___
2. Is collective bargaining necessary? Y ___ N ___
3. Would the use of exit incentives enhance morale? Y ___ N ___
4. To whom should the employer offer the exit incentives?_____________
5. How long should the window period be?_____________
6. Should the employer retain the right to reject certain acceptances? Y ___ N ___
7. Will the exit incentive program raise age or other discrimination concerns? Y ___ N ___
8. How will the employer document the voluntary nature of participation in the exit incentive program?____
9. How will exit incentive plan fraud claims be minimized? _______________

E. RIF Benefits

1. What benefits are appropriate? _____________________________________
2. Should they be provided under a qualified plan? Y ___ N ___
3. Should any RIF benefit plans be amended to accomplish the layoffs? Y ___ N ___
4. Has the employer adequately reserved the right to amend the plans? Y ___ N ___

5. Are the benefits affordable? Y ___ N ___
6. What will be the financial statement impact of the benefits? ______________
____
7. How will the employer integrate health benefits with COBRA requirements?
____
____
8. Will the benefit program meet applicable ADEA, ERISA, Internal Revenue Code, and other legal requirements? Y ___ N ___

F. Releases

1. Should the employer require a release of claims? Y ___ N ___
2. Does an existing applicable severance benefit plan condition benefits on execution of a release? Y ___ N ___
3. Will the extra incentives be sufficient to obtain a release? Y ___ N ___
4. Is there time to seek an ADEA release? Y ___ N ___
5. Would the statistical data required to obtain an ADEA release be difficult to compile or create an inference of discrimination? Y ___ N ___

G. Implementation

1. Who will be on the employer's RIF task force? _________________________
____
How will responsibilities be allocated?_______________________________
____
2. Is preparation of a RIF implementation schedule appropriate? Y ___ N ___
3. How will the task force make and document decisions?__________________
____
What sort of training should be provided to task force members? __________
____
4. Will the employer try to keep the program secret until it is finalized?
Y ___ N ___
If so, how will company representatives respond in the event that employees ask if exit incentive programs are planned for the future?_________________
____
5. Are new administrative forms or other documentation necessary?
Y ___ N ___
6. Are forms complete, understandable, and practical? Y ___ N ___
7. How will the employer handle document preparation, printing, distribution, collection, processing, and retention? _______________________________
____
8. How will the employer integrate the program with existing procedures for terminating employees?____
____
9. How and when will supervisor training take place? _____________________
10. How will the employer communicate the program? _____________________

11. How will the employer comply with the WARN Act and communicate individual terminations? ____

    Will outplacement counseling be an integral part of the communication process? Y ___ N ___

12. When and where will the employer provide final paychecks? ____________

    How will the employer handle outstanding loans to employees? __________

    ____

    Are final paycheck deductions permissible in the jurisdiction? Y ___ N ___

13. When will the employer collect its property from terminated employees?

    ____

    How will it safeguard its property from vandalism? ____________________

    ____

14. Is there a need to reemphasize preexisting confidentiality or trade secrets agreements with terminating employees? Y ___ N ___