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**THE LEGAL IMPLICATIONS OF A REDUCTION IN FORCE**

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**I. INTRODUCTION**

With the combination of the current economic downturn and the proliferation of corporate mergers and consolidations comes the inevitable decision to conduct a reduction in force ("RIF"). This article contains a non-exhaustive list of issues to be considered in the course of making and implementing the RIF decision.<sup>1</sup>

**II. HOW TO PLAN FOR A REDUCTION IN FORCE****A. Consider Alternatives**

Before settling on a decision to conduct a RIF, employers should consider all available options, including the following: salary freezes or reductions; hiring freezes or reductions; voluntary separation programs; early retirement incentive programs; temporary plant shutdowns; or reduced workdays or work weeks.

**B. Determine Basis for RIF, Selection Criteria, and Create Documentation**

The prudent employer considering a reduction in force should immediately determine the basis for the RIF, the selection criteria to be used in selecting employees affected by the RIF, and documenting both the selection criteria and the decisions made on the basis of that criteria.

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<sup>1</sup> The following articles provided many of the ideas and citations contained in this summary, and offer a more thorough evaluation of the various legal issues arising out of reductions in force: Lynne C. Hermle, *Reductions in Force: Obtain the Benefits While Avoiding the Pitfalls*, 663 PLI/Lit 189 (Oct. 2001); William E. Hannum III, Jill Green Lebow, *The Critical RIF Checklist: What Laws Apply to Downsizing?*, 661 PLI/Lit 113 (Sep. 2001).

**C. Establish Termination of Employment Procedures**

The employer should also plan the actual termination of employment procedures for the affected employees. This includes separation notices as required by the Department of Labor, security measures, and termination meetings.

**D. Determine RIF Notice Obligations**

Depending on the number of affected employees, a reduction in force ("RIF") may trigger certain notice obligations imposed by federal or law, although Georgia employees affected by a RIF are not covered by any state law equivalent or extension of the federal Worker's Adjustment and Retraining Notification Act ("WARN" or the "WARN Act"), 29 U.S.C. §§ 2101-2109. Because notice under the WARN Act must be given 60 days in advance of the covered "plant closing" or "mass layoff," determining notice obligations under the WARN Act should be at the top of the employer's to-do list in a RIF situation.

**E. Determine Severance Obligations or Intentions**

The employer should also determine whether the affected employees are already entitled to severance benefits, or whether severance benefits will nonetheless be offered to them. This involves review of the existing collective bargaining agreement ("CBA") or employment contracts and company policies, and preparation of severance and release agreements.

**F. Are Union Employees Affected?**

If any of the affected employees are unionized, obligations imposed by the National Labor Relations Act (the "NLRA") and the terms of an existing CBA must

be considered at each stage of the RIF planning process.

**G. Does the RIF Involve Bankruptcy?**

If the company is or anticipates the possibility of soon being involved in bankruptcy proceedings, employers must consider the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") as it applies to the RIF.

**H. Determine Whether RIF Will Impact H-1B Employees**

Where the RIF will result in termination of the employment of an employee working under an H-1B visa, employers must consider their liability for return transportation costs abroad, obligations to notify the Immigration and Naturalization Service (the "INS"), and timing issues to maintain the lawful status of the H-1B employee in this country.

**III. PLANT CLOSING LAWS**

**A. The WARN Act**

The federal WARN Act requires 60 days' notice by covered employers to employees and certain government officials regarding a "plant closing" or "mass layoff" as those terms are defined in the Act.

**1. Determining Employer Coverage Under WARN Act**

The WARN Act covers businesses employing 100 or more employees, who must be either full-time employees, or full or part-time employees who in the aggregate work a total of at least 4,000 hours per week, excluding overtime. 20 C.F.R. § 639.3(a)(i). It is important to note that although foreign sites are not covered by the WARN Act, United States workers at foreign sites are counted

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towards the 100-employee minimum. 20 C.F.R. § 639.3(h)(7).

## 2. Determining the WARN Act Notice Date

Employers covered by WARN have certain notice obligations if there is a "plant closing" or a "mass layoff." 20 C.F.R. § 639.4. A plant closing is defined as a permanent or temporary shutdown of a "single site of employment," or "one or more facilities or operating units within a single site of employment," if the shutdown results in an "employment loss" at the site of 50 or more employees (excluding part-time employees) during any 30 day period. 20 C.F.R. § 639.3(b). An operating unit is defined as "an organizationally or operationally distinct product, operation, or specific work function within or across facilities at a single site." 20 C.F.R. § 639.3(j).

A mass layoff is defined as a RIF resulting in an "employment loss" at a "single site of employment" during any 30 day period of either: (a) at least 33% of the employees (excluding part-time employees), amounting to a total of 50 employees; or (b) 500 or more employees (excluding part-time employees). 20 C.F.R. § 639.3(c)(i)-(ii).

In determining whether a plant closing or mass layoff has occurred, not all changes in employment status will be considered an "employment loss." The statute covers only the following "employment losses": (1) a termination of employment, other than a discharge for cause, voluntary resignation, or retirement; (2) a layoff for more than six months; or (3) a reduction in hours by more than fifty percent for at least six months. 29 U.S.C. § 2101(a)(6)(A)-(C); 20 C.F.R. §

639.3(f)(1).

There is no covered "employment loss" if alternative, equivalent employment is offered to the affected employees. See *Martin v. AMR Services Corp.*, 877 F. Supp. 108, 116-17 (E.D.N.Y. 1995), aff'd sub nom. *Gonzales v. AMR Services Corp.*, 68 F.3d 1529 (2d Cir. 1995). Because the employer in *Martin* offered alternative employment to the affected employees after a plant closing, the court found that the employees had not suffered an employment loss because they retained their benefits, including seniority, accrued vacation and sick pay, and they moved to equivalent positions within the company. *Id.* at 116-17. If, however, the position is not equivalent, and salary and benefits are not retained, there may be an employment loss. *Local 819, Int'l Brotherhood of Teamsters, AFL-CIO v. Textile Deliveries, Inc.*, 2000 U.S. Dist. LEXIS 13441, at \*18-19 (S.D.N.Y. September 13, 2000) (denying summary judgment to employer because, although alternative employment was offered, employees were not placed in equivalent positions and suffered loss of employee benefits, such as seniority, health, welfare, pension and vacation benefits).

The WARN Act only includes "active employees" in calculating the 50-employee threshold for mass layoff situations. 20 C.F.R. § 639.3(c)(1)(i). Active employees are defined as employees "currently on the payroll and in pay status as of the time of the mass layoff." 54 Fed. Reg. 16046.

Part-time employees are not counted in determining whether the 50-employee threshold for WARN Act notice requirements are triggered. A part-time

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employee is defined as an employee who: (1) averaged less than 20 hours per week (during the shorter of the actual time the employee has been employed or the most recent 90 days); or (2) worked less than six of the twelve months preceding the date on which notice is required. 29 U.S.C. § 2101(a)(8); 20 C.F.R. § 639.3(h); *See Solberg v. Inline Corp.*, 740 F. Supp. 680, 685 (D. Minn. 1990) (holding mass layoff did not occur under WARN Act because 300 employees affected were part-time employees, where employees worked fewer than six months before layoff and their employment was terminated after only five months on the job).

WARN notice obligations may be unexpectedly triggered by a misinterpretation of the term "single site of employment," which can include "a group of contiguous locations." 20 C.F.R. 639.3(i). Generally, separate buildings may be considered a single site of employment for WARN Act purposes if (a) they are in reasonable geographic proximity, (b) they are used for the same purpose, and (c) they share the same personnel and equipment. 20 C.F.R. § 639.3(i)(1)-(8); *see Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275, 1290 (5<sup>th</sup> Cir. 1994) (holding that two building sites several miles apart can be considered single site of employment where the two sites were separated only as a result of employer's need for additional office space).

### 3. Aggregation Rules Affecting the RIF

To further complicate matters, an employer must look ahead and back at rolling 30 and 90 day periods to determine whether the aggregate employment losses occurring within these periods meet the threshold for the WARN notice

obligations. 20 C.F.R. § 639.5(a).

The date the first notice is required to be given is the critical "snapshot" date. 20 C.F.R. § 639.5(a)(2). Thus, if multiple layoffs are involved, the "snapshot" date is 60 days prior to the first layoff.

In applying the 30 day rule for aggregation purposes, unlike the 90 day rule, all RIFs must be aggregated, regardless of the reasons for the RIFs or the number of employees affected by the RIFs. 20 C.F.R. § 639.5(a)(i)-(ii). RIFs occurring within the 90 day period are not aggregated if the employer can show that they were the result of "separate and distinct actions or causes" and were not an attempt to evade WARN obligations. 20 C.F.R. § 639.5(a)(1)(ii). Some courts have held, however, that "layoffs that are occasioned by a continuing and accelerating economic demise are not the result of separate and distinct causes." See *United Paperworkers Int'l Union v. Alden Corrugated Container Corp.*, 901 F. Supp. 426, 436 (D. Mass. 1995) (holding two RIFs occurring within 90 day rolling period triggered WARN obligations, where aggregated RIFs affected 54 employees constituting more than thirty-three percent of work force); *Hollowell v. Orleans Regional Hosp., LLC*, 217 F.3d 379, 383 (5<sup>th</sup> Cir. 2000) (holding multiple RIFs were not "separate and distinct" because they stemmed from and were caused by same economic downturn). The Sixth Circuit recently reached a different conclusion in holding that two RIFs, one due to "continuing loss of income and resulting financial decline," and the other layoff of three employees due to a project co-sponsor's failure to pay its share of certain expenses, resulted from separate and distinct causes

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under the WARN Act's 90 day rule. *Oil, Chem. and Atomic Workers Int'l Union, Local 7-629, AFL-CIO v. RMI Titanium Co.*, 199 F.3d 881, 885 (6<sup>th</sup> Cir. 2000). It is important to remember that the 90 day rule requires aggregation of only those RIFs that "separately [are] not of sufficient size to trigger WARN." 20 C.F.R. § 639.5(a)(ii). Thus, if only one of two RIFs within a 90 day period, standing alone, triggered WARN, then the RIFs would not be aggregated. *See, e.g., United Electrical, Radio and Machine Workers of America v. Maxim, Inc.*, 1990 U.S. Dist. LEXIS 5988, at \*9 (D. Mass. May 15, 1990) (holding two RIFs occurring within 90 day period were not aggregated because second RIF was sufficient to trigger WARN).

#### 4. Determining Employees Entitled to Notice

Employers required to provide notice under WARN' must provide 60 days' written notice to: (1) the representative(s) of the affected employees or, if there is no representative, each employee reasonably expected to suffer an employment loss; (2) the state dislocated worker's unit; and (3) the chief elected official of the unit of local government. 20 C.F.R. § 639.6. Note that although part-time employees are not counted when determining whether notice is required, they must nonetheless receive the same notice given to full-time employees. 20 C.F.R. § 639.6(b).

The Georgia Department of Labor offers additional information on WARN obligations and the Georgia dislocated worker's unit at <http://www.dol.state.ga.us/eshtml/warn.htm>.

## 5. Preparing WARN Act Notices

Pursuant to 20 C.F.R. § 639.7(c), the WARN notice to each affected employee's representative must contain at least the following information:

- i. the name and address of the employment site where the plant closing or mass layoff will occur;
- ii. the name and telephone number of a company official to contact for further information;
- iii. a statement as to whether the planned action is permanent or temporary;
- iv. the expected date of the first employment loss and the anticipated schedule for making separations; and
- v. the job titles of positions affected and the names of workers currently holding affected jobs.

Pursuant to 20 C.F.R. § 639.7(d), the notice to each affected employee must contain at least the following information:

- i. a statement as to whether the planned action is to be permanent or temporary;
- ii. the date of the employee's separation;
- iii. an indication as to whether or not bumping rights exist; and
- iv. the name and telephone number of a company official to contact for further information.

Finally, notice to the local government official and the state dislocated worker's unit must contain at least the following information:

- i. the name and address of the employment site where the plant closing or mass layoff will occur;
- ii. the name and telephone number of a company official to contact for further information;
- iii. a statement as to whether the planned action is permanent or temporary, and a statement that the entire plant is to be closed, if applicable;
- iv. the expected date of the first separation, and the anticipated schedule for making separations;
- v. the job titles of positions affected and the number of affected employees in each job classification;
- vi. an indication as to whether bumping rights exists; and

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vii. the name of each union representing affected employees, and the name and address of each union's chief elected official.

If the employer maintains the information listed above in a readily accessible location on site, the state dislocated worker unit and the local government need only be provided less detailed notices which contain a written notice including the name and address of the employment site, the name and telephone number of a company official to contact; the expected date of the first separation; and the number of affected employees. 20 C.F.R. § 639.7(f).

#### 6. Exceptions to the 60 Day Notice Requirement

The WARN Act contains certain exceptions due to "unforeseeable business circumstances," a "faltering business," or a "natural disaster." *See generally* 29 U.S.C. § 2102(b); 20 C.F.R. § 639.9. If an employer cannot assert one of the foregoing exceptions, it may pay its employees in lieu of providing the statutory 60 days' notice. 29 U.S.C. § 2104(a)(2)(B).

#### B. State Plant Closing Laws

Georgia does not have an applicable plant closing law; however, some states have plant closing laws that provide additional requirements in the event of a RIF that triggers the applicable statute. *See, e.g.*, Conn. Gen. Stat. § 31-50; Mass. Gen. Law ch. 175 §§ 110D and 110 G; N.J. Admin. Code § 12:17-3.5.

#### IV. DISCRIMINATION CLAIMS AND WAIVERS

RIFs must be consistent with federal anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act (the "ADEA"), the Americans with Disabilities Act (the "ADA"),

and other federal and state laws. Employers must identify the reason for the RIF and legitimate selection criteria to be applied, and then document the basis for the RIF. In a positive case for employers fearful of ADEA claims from the RIF, the Seventh Circuit upheld an employer's decision to retain those employees with the "longest-term potential." *Thorn v. Sunstrand Aerospace Corp.*, 207 F.3d 383 (7<sup>th</sup> Cir. 2000) (holding "longest-term potential" was not synonymous with youngest). Even though older employees tend to make more money than their younger counterparts, high salary as one of several criteria for making layoff decisions does not necessarily establish a discriminatory impact. *E.g., DiCola v. SwissRe Holding*, 996 F.2d 30 (2d Cir. 1993); *Hamilton v. Grocers Supply Co.*, 986 F.2d 97 (5<sup>th</sup> Cir. 1993).

Employees may contend that the RIF is merely a pretext for discrimination. Where companies have attempted to disguise a termination involving only one or two employees as a "restructuring" or RIF, courts have been suspicious of the label. *See, e.g., White v. Blackfoot School Dist.*, 2001 U.S. App. LEXIS 5352 (9<sup>th</sup> Cir. 2001) (involving only one employee); *Washington v. Garrett*, 10 F.3d 1421, 1432 (9<sup>th</sup> Cir. 1993) (plaintiff was only administrator not to receive renewal notice in "reorganization" raised question of whether employer's explanation was credible). As an illustrative case of conduct to avoid during the RIF, the Tenth Circuit in *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159 (10<sup>th</sup> Cir. 1998) reinstated eight plaintiffs' race and age discrimination claims arising out of a RIF where a jury could infer that the employer falsified employee performance evaluations, laid off

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employees within the protected class but retained employees outside the protected class, used its layoff criteria in a selective manner, and hired replacements for the positions that were allegedly being eliminated. *See also Banks v. Travelers*, 180 F.3d 358, 362 (2d Cir. 1999) (affirming jury verdict for plaintiff where, among other evidence, budget documents revealed that decision to terminate plaintiff was actually made before employer supposedly engaged in "staff adjustment" process).

In order to consider "disparate impact" implications, the employer should also have its counsel conduct statistical analyses regarding the selection of employees in the protected classes set forth in applicable federal and state anti-discrimination laws.

If the RIF will involve severance and release agreements, employers must be mindful of the law on enforceable waiver and release of a discrimination claim. For employees over 40 years of age, the severance and release agreement must comply with a subset of the ADEA entitled the Older Workers' Benefit Protection Act (the "OWBPA"), 29 U.S.C. § 626(f). The OWBPA provides that if the release arises out of a "group termination" or RIF involving employees 40 years of age and older, those employees are entitled to additional information in the release, including (i) 45 days to review their severance agreements, and (ii) certain information, including eligibility factors and the job titles and ages of individuals selected and not selected for the RIF. 29 U.S.C. §§ 626(f)(1)(F)(ii) & (H).

## V. COBRA ISSUES

Under the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"),

terminated employees and their spouses and dependents covered by the employer's health plan are guaranteed the right to continue in the employer's group health plan for a certain period, typically for up to 18 months following termination of employment, provided that the employee pay the premiums and a small administrative fee. 29 U.S.C. § 1161(a). COBRA obligations apply to all employers employing 20 or more employees. 29 U.S.C. § 1161 (a). In a RIF, as with any termination, covered employers must provide discharged employees with COBRA notification.

## VI. ERISA

ERISA issues arise in a RIF situation both in terms of severance plans and Section 510 lawsuits alleging termination in order to avoid attainment of an employee benefit.

### A. ERISA and Severance Plans

Even though an employer may not have distributed a written severance plan, an employer may in some circumstances be found to have a de facto ERISA severance plan based on a practice or policy of offering severance to terminated employees. *See, e.g., Beyland v. Rome Cable Corp.*, 1997 WL 176390 (N.D.N.Y. April 10, 1997).

Employers with formal, written ERISA severance plans must consider whether that plan should be amended for the purposes of establishing or altering the benefits offered pursuant to a particular RIF. *See Reichelt v. Emhart Corp.*, 921 F.2d 425, 430 (2d Cir. 1990) (holding that under ERISA, employers have the right at

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any time to amend or terminate severance pay plans).

#### B. ERISA Section 510 Claims

Section 510 of ERISA prohibits employers from discriminating against an employee by terminating his or her employment for the purpose of interfering with the attainment of any ERISA right. 29 U.S.C. § 1140. Employees terminated as a result of a RIF may file a Section 510 lawsuit alleging that they were selected for layoff in order to prevent them from vesting in an employee benefit covered by ERISA, such as an employee pension plan.

### VII. COLLECTIVE BARGAINING AGREEMENTS

Employers with employees covered by a CBA must consider the obligations imposed by the National Labor Relations Act and the CBA itself. In some cases, the employer may be required to bargain over a RIF, provided that the contract does not expressly relieve the employer of this obligation. A RIF is not a mandatory subject of bargaining if it results from the company's decision to "shut down part of its business purely for economic reasons." *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 686 (1981). If, however, labor costs motivate the company to reduce its work force, then the RIF may be a mandatory subject of bargaining. *See, e.g., Storer Cable TV of Texas, Inc.*, 295 NLRB 295, 296 (1989). Regardless of whether the decision to conduct a RIF and the procedures involved therein are a mandatory subject of bargaining, the effects or impact of a RIF are a mandatory subject of bargaining. *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1307 (8<sup>th</sup> Cir. 1988); *Cargill, Inc.*, 294 NLRB 867, 869-70 (1989).

Even if the employer is not required to bargain over the RIF, the CBA may specify certain criteria that must be followed in conducting layoffs, require severance benefits, or provide for additional notice requirements.

### VIII. BANKRUPTCY ISSUES

Employers conducting a RIF as a result of or in contemplation of filing bankruptcy proceedings should consider the impact of the Bankruptcy Code on employee payments, and WARN obligations, involved in the RIF. The Bankruptcy Code essentially establishes three tiers of priorities for wages and similar claims. Wages earned "for services rendered after the commencement of the [bankruptcy] case" are entitled to first priority as administrative claims. 11 U.S.C. §§ 507(a)(1), 503 (b)(1)(A). Wages of up to \$4,650.00 earned within 90 days before the earlier of the filing date of the bankruptcy or the date of the cessation of the business, are entitled to third priority under the Bankruptcy Code. 11 U.S.C. § 507(a)(3). The remaining wage claims are treated as unsecured claims.

The courts generally treat WARN Act liability that arises from a pre-petition failure to provide the requisite 60 days' notice as third priority, "comparable to privately negotiated severance pay. It is severance pay in lieu of notice, imposed by statute." *In re Kitty Hawk, Inc.*, 255 B.R. 428, 438 (Bankr. N.D. Tex. 2000); *In re Cargo, Inc.*, 138 B.R. 923, 925-26 (Bankr. N.D. Iowa 1992). Conversely, WARN Act liability that arises after the filing of the bankruptcy petition has generally been treated as a first priority administrative claim. *E.g., In re Beverage Enterprises, Inc.*, 225 B.R. 111, 116 (Bankr. E.D. Pa. 1998).

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If severance pay is based upon length of service, administrative priority is generally granted to that portion of the severance pay earned after the filing of the bankruptcy petition, while severance earned pre-petition will be treated as a third priority claim. *In re Russell Cave Co.*, 248 B.R. 301, 303 (Bankr. E.D. Ky. 2000).

#### IX. IMPACT OF RIF ON H-1B EMPLOYEES

To the extent that H-1B employees will be laid off under the RIF program, employers must consider the immigration issues arising out of that decision. The Immigration and Nationality Act of 1952 ("INA") provides that where an H-1B employee "is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien abroad." 8 U.S.C. § 1101 *et seq.*; 8 U.S.C. § 1184(c)(5)(A), 8 C.F.R. § 214.2(h)(4)(iii)(E). INS regulations also require the employer of an H-1B employee to notify the INS "immediately" of "any changes in the terms and conditions of employment of a beneficiary which may affect [H-1B] eligibility." 8 C.F.R. § 214.2(h)(11)(i)(A). The INS has taken the position that the employment relationship terminates upon cessation of service rather than cessation of severance payments, stating that an H-1B nonimmigrant terminated under a RIF would not be maintaining valid H-1B status once the employer terminates their service, "regardless of any arrangements for severance pay." See Letter from Thomas W. Simmons, Chief, INS Business and Trade Services Branch, 76 Interpreter Releases 387 (Mar. 8, 1999).