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The RIF Roadmap: Tools and Tactics for a Smooth and Compliant Transition

Navigating Workforce Transitions in Uncertain Times

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Introduction – Why Are We Here?

- Businesses are in a state of flux with the ever-changing economic indicators and fears over tariffs and their impact on the economy.
- We have been hearing from clients that they are in the midst of reevaluating their workforce and their employee needs.
- Our goal today is to provide you a comprehensive guide on RIF planning, from how to implement the RIF, complying with WARN and mini-WARN Act, severance agreements, and benefit implications, as well as some Dos and Don’ts.
- Let’s get started!

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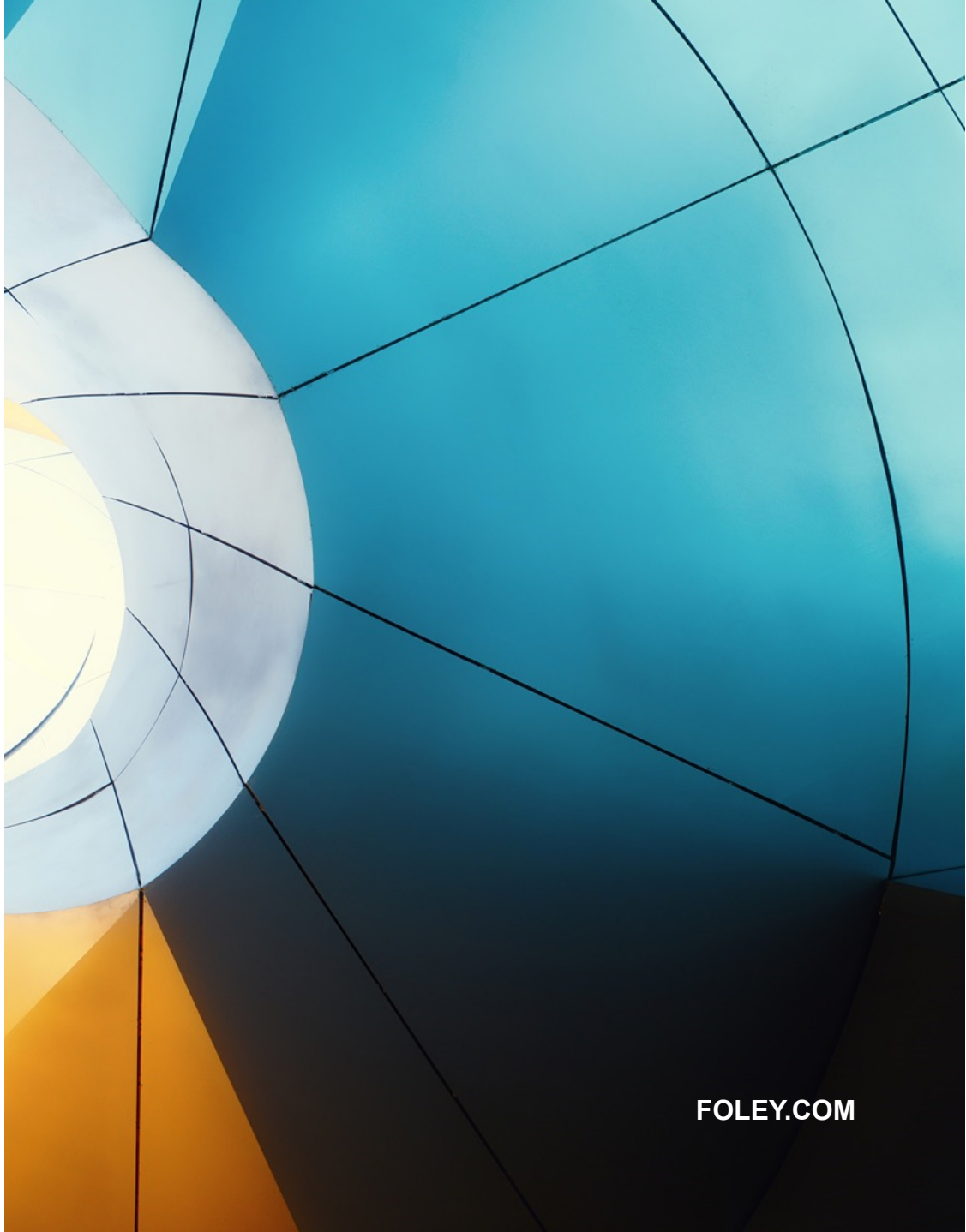
WARN Act and "Mini" WARN Acts



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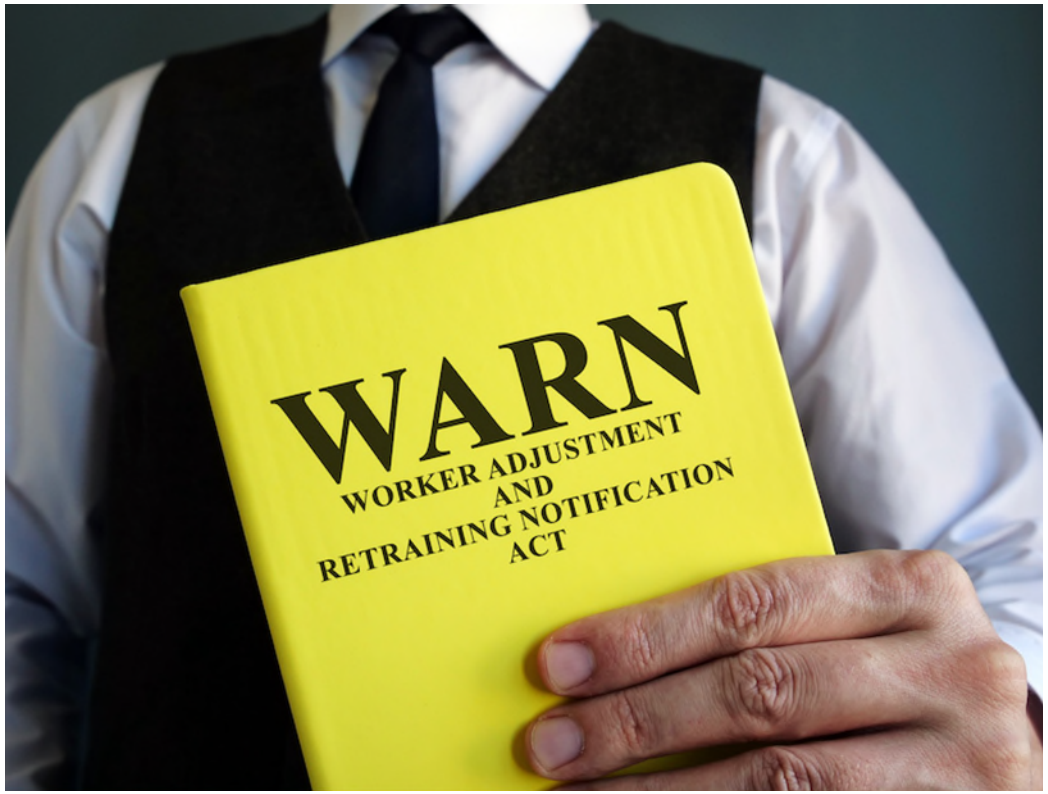
Basic Requirement

- The WARN Act requires all employers with 100 or more employees to provide at least 60 days' prior written notice of any covered plant closing or mass layoff



Covered Employees

- Salaried and hourly employees, as well as managerial and supervisory employees, are entitled to notice under WARN
- Business partners, independent contractors, and temporary employees are not entitled to notice

Triggers for Notice: Plant Closing

- An employer must give notice of plant closing if it results in 50 or more full-time employees suffering an “employment loss” at the site during any 30-day period
- A plant closing is the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment

Triggers for Notice: Plant Closing

- Part-time employees are **NOT** included when calculating the 50-person threshold test
  - But they are entitled to notice if WARN is triggered
  - Part-time is defined as an employee who works less than 20 hours a week OR less than 6 months in the last 12
- Temporary employees are included when applying the 50-person threshold test
  - But they are **NOT** entitled to notice if WARN is triggered

Triggers for Notice: Mass Layoff

- Any reduction in force which, within a 30-day period, results in employment loss at a single site of either:
  1. a third or more of the site's active full-time employees, but at least 50 employees; or
  2. at least 500 full-time employees

Triggers for Notice: Aggregation Of Losses

- If two (2) or more groups suffer employment losses at a single site of employment during a 90-day period, and each group is less than the minimum number required to trigger WARN notice, the groups will be aggregated
  - unless the employer demonstrates that the losses resulted from separate and distinct employment actions and not from an attempt to evade WARN requirements

Employment Loss Defined

- An employment loss is:
  1. a termination of employment that is not a discharge for cause, a voluntary departure, or a retirement;
  2. a layoff exceeding six (6) months; or
  3. a reduction in work hours of more than 50% during each month of any six-month period

Recipients and Content of Notice

- As long as notice is in writing, and is specific, no particular form is required
- Any delivery method reasonably designed to ensure receipt within the 60-day time frame is acceptable

Recipients and Content of Notice

- The following parties also must receive notice:
  - If applicable, the covered employees' union representative(s)
  - If no union representative, each individual covered employee
  - The State Dislocated Worker Unit
  - The chief elected official of the local government unit within which the plant closing or layoff will occur

Exceptions to the Notice Requirement

- The following circumstances completely relieve the employer from the WARN notice requirement:
  - Closing of temporary facilities at the conclusion of particular projects, where employees were hired with the understanding that their employment was limited to the duration of the particular project; and
  - Strikes and lockouts which arise from bona fide labor disputes

Exceptions to the Notice Requirement

- The following circumstances may relieve the employer from the full 60-day notice requirement:
  - Faltering company — applies to plant closings, where giving notice would ruin opportunity to get new capital or business
  - Unforeseeable business circumstances
  - Natural disaster

“Mini” WARN: New Jersey

- Millville Dallas Airmotive Plant Job Loss Notification Act (N.J.S.A. 34:21-1 et seq.)
- Applies to any employer who employs 100 or more employees.
- Requires covered employers to provide 90 days’ written notice before:
  - A transfer of operations or a termination of operations resulting in the termination of 50 or more employees within a 30-day period.
  - A mass layoff.
- Makes no distinction between full-time and part-time – all employees count toward the threshold

“Mini” WARN: New Jersey (cont.)

- Penalties for Non-Compliance:
  - Employers failing to provide the entire 90-days of notice are required to provide to each employee, whose employment was terminated without such notice, severance pay equal to one week of pay for each full year of employment.
  - Employes must pay an additional four weeks of severance to each employee who received less than the number of days of notification required.

“Mini” WARN: New Jersey (cont.)

- Differences from federal WARN Act:
  - “Each employee” must receive notice, regardless of union membership.
  - Liability is not decreased based on the amount of notice given by an employer.
  - No “faltering business” exception.
  - Expanded assistance to affected employees.
  - Severance obligation applies whether proper notice is given or not
  - No “employment loss” or notice is required if employer offers a job in NJ and within 50 miles of the establishment.
  - Employers are liable for an additional 4 weeks of severance if they fail to give 90 days notice

“Mini” WARN: New York

- NY LABOR § 860 et seq.
- Applies to private sector employers that employ at least 50 full time employees located in New York or who work a total of 2,000 hours per week in New York state, including overtime hours.
- Requires covered employers to provide 90 days’ written notice before a:
  - Plant closing
  - Mass layoff
  - Reduction in work hours
  - Relocation of substantially all facility operations

“Mini” WARN: New York (cont.)

- Penalties for Non-Compliance:
  - $500/day (applied in the aggregate and not per employee up to max penalties that can be assessed under federal WARN Act).
  - Back pay at the greater of the employee’s final rate of pay or average compensation rate over the three preceding years.
  - The value of benefits the employee would have been entitled to receive if the employee had not lost employment, including medical expenses incurred that would have been covered under benefit plan.
- No significant differences from federal WARN Act other than notice period, covered employer size, and layoff threshold.

“Mini” WARN: California

- California Labor Code § 1400 et seq.
- Applies to employers who own and operate facilities with at least 75 employees within the preceding 12 months.
- Requires 60 days' advance written notice before:
  - A mass layoff.
  - A relocation (100 miles or more away).
  - A termination, which is the cessation or substantial cessation of industrial or commercial operations in a covered establishment.

“Mini” WARN: California (cont.)

- Penalties for Non-Compliance:
  - $500/day unless employer pays the amount for which it is liable to all applicable employees within three weeks of triggering event.
  - Back pay at the higher of employee's final rate or three-year average rate of compensation.
  - The value of benefits employee would have been entitled to receive if the employee had not lost employment, including medical expenses incurred that would have been covered under benefit plan.
  - Note: Liability is calculated for the shorter of the period of the employer's violation, up to 60 days and one-half the number of days the employee was employed.

“Mini” WARN: California (cont.)

- No significant differences from federal WARN Act other than covered employer size and layoff threshold.

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Unions and RIFs

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RIF Considerations in Union Environment

- Must the employer bargain over decision to conduct RIF?
  - Legal and practical considerations
- If not, must the company bargain about the effects?
- Refer to contract regarding selection, process, and economic consequences

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Benefits and Severance Pay

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Separation Pay – Existing Plan

- Confirm whether existing employment agreement or severance pay governs
- Always consider amount and timing of payments, esp. if lump sum
- Are amendments needed?

Separation Pay – Typical Components

- Severance pay
  - Lump sum or over time
  - Often varies by position and/or years of service
  - Often includes minimum and maximum
- Continued health coverage
  - Consider cash payment in lieu of subsidized COBRA
- Outplacement services
- Separation agreement with release required

Voluntary Program (Including Early Retirement)

- Employees opt-in during limited window
- Can limit to specific age and years of service (e.g., at least age 50 with five (5) years of service) without ADEA violation
- Can limit who can elect (e.g., no more than five employees from Accounting Dept.)
- Can exclude employees who play critical roles
- Benefits should be better than normal separation pay plan

ERISA Plan Status

- If sufficient “administrative scheme” and salary continuation limited to two (2) years of pay, then ERISA welfare plan
- Benefits of ERISA plan:
  - Claims and appeals process
  - Litigation limited to review of administrative record
  - Remedies limited to benefits plus sometimes lawyer’s fees
- Would need summary plan description and Form 5500 (if more than 100 participants)

Tax Issues

- Separation pay is taxable wages, subject to withholding
- Free or subsidized COBRA premiums probably not taxable
  - If self-insured medical and benefits provided predominantly to highly compensated, taxable
- Outplacement services not taxable as working condition fringe

Other Benefit Issues

- Severance pay is not 401(k) pay — no employee contributions
- Unused FSA balances cannot be refunded
  - But could allow spend down of medical care FSA
  - But not dependent care FSA because not working
- Other special provisions require confirmation of plan terms or amendment
  - Special care for insured arrangements

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Selection Criteria and Severance Agreements

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Selecting Employees for Termination

- Objective versus subjective criteria
  - Objective:
    - By department or similar organizational unit.
    - Based on geographic location or remote/in-person status.
    - Redundant positions.
  - Subjective:
    - Performance-based.
    - Value to the organization.
    - Likelihood of success based on skill set after RIF/reorganization.

Disparate Impact and Other Post-Identification Analyses

- If subjective criteria are used to select the layoff group:
  - Consider whether objective evaluation guidelines were applied to the selection decisions.
  - Ensure that the selection decisions and reasons for those decisions are well documented. (This is true no matter what, but even more so when criteria is subjective.)
- Conduct a disparate impact analysis:
  - Gather information about the protected characteristics of the RIF group — e.g., age, gender, race — and determine whether any group is disproportionately represented. This may involve a statistical analysis.
  - This will be discoverable in litigation unless conducted by counsel

Severance Agreements

- Written severance agreements can provide clarity to employees on their severance benefits, and other post-termination issues, and memorialize the terms of separation from their employer.
- The agreement should always include the last date of employment.
- Any release included in the agreement must comply with all federal and applicable state law.
  - States may preclude the release of certain employment-related claims. For example, NY and NJ preclude the release of unemployment-related claims.

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Severance Agreements

- OWBPA (applies to employees 40 years or older) requires that releases be entered into knowingly and voluntarily, meaning (among other things):
  - The release references the ADEA.
  - Provides at least 45 days to consider the release before signing it and seven days to revoke the release after signing it (only 21 days is required for one employee aged 40 and over being terminated to consider a release before signing, but the seven-day revocation period still applies).
  - The employer discloses certain information to employees related to their termination, which is usually provided in an exhibit or addendum to the release agreement.

Unemployment Benefits After a RIF

- Generally, employees terminated as part of a RIF **will** be eligible for unemployment benefits.
- Unemployment is administered on a state-by-state basis.
- Severance agreement may outline process for applying for benefits and may also state affirmatively that employer will provide accurate and truthful information in response to application for benefits.
- The employee must advise the state when applying for unemployment benefits if they have received severance and for how many weeks; that amount may be taken into consideration when determining benefits.

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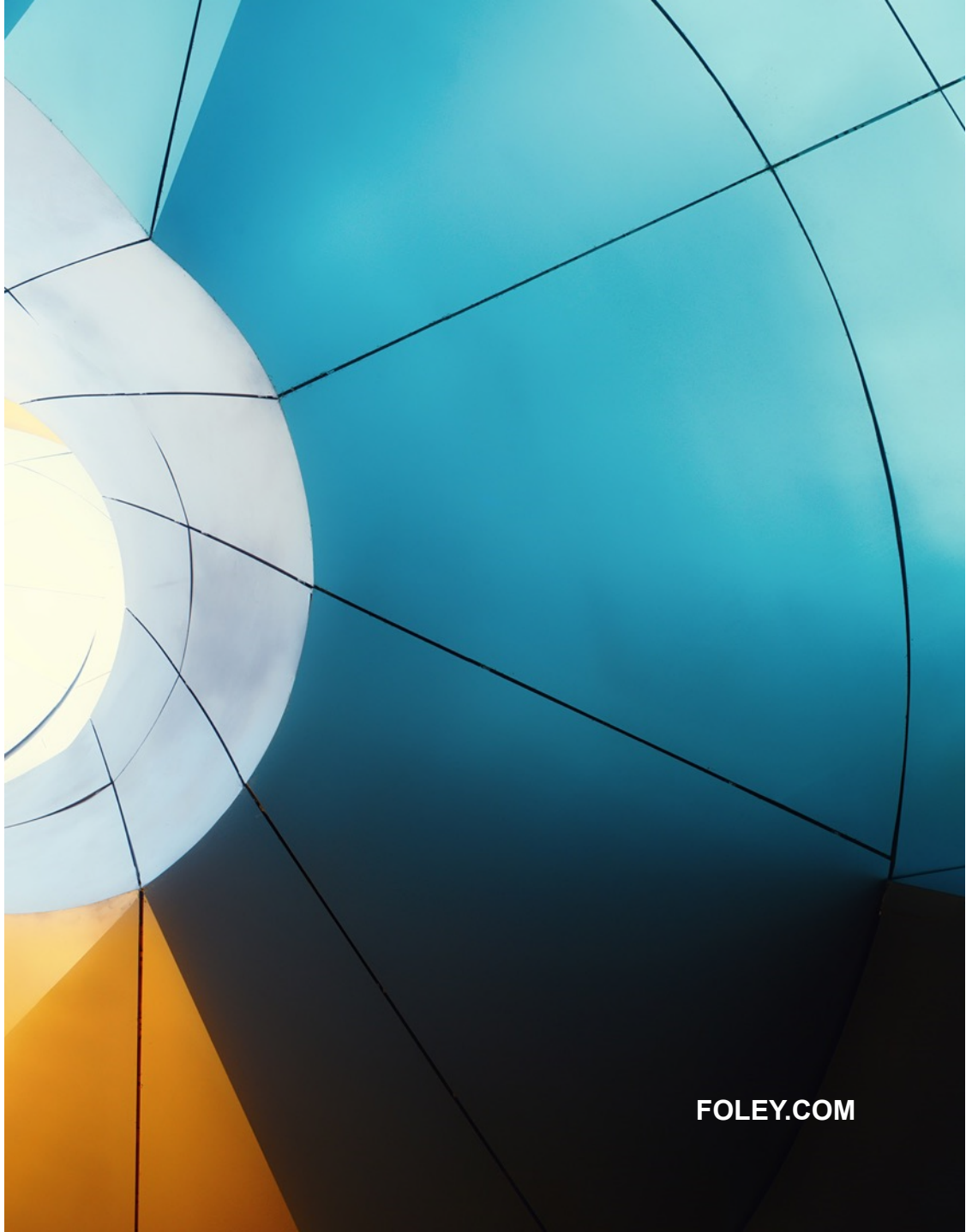
Dos and Don’ts



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Dos and Don’ts

- Do:
  1. Plan in advance
  2. Train HR and business
  3. Make systematic and consistent decisions
  4. Document the decisions
  5. Conduct disparate impact and legal review
  6. Comply with OWBPA
  7. Do it one time if possible

- Don’t:
  1. Consider improper factors (leaves, complaints, disabilities, protected status)
  2. Use factors that are a proxy for age: retirement discussions, excluding high potential, blockers, etc.
  3. Allow managers to make decisions without a good rationale
  4. Allow managers to avoid documenting decision reasons
  5. Re-hire employees or contractors into the same position after RIF

Dos and Don’ts in Implementing a RIF

- Be certain of the criteria for selection
  - Seniority
  - Performance
  - Different for hourly versus salaried?
- Adverse Impact Analysis
  - Should you do one?
  - Who should conduct the analysis?
    - Consider privilege issues

Dos and Don’ts in Implementing a RIF

- Do you include poor performers?
  - What does that mean?
  - Are you replacing the position? And when?

Dos and Don’ts in Implementing a RIF

- Options to consider
  - Hiring Freeze
  - Voluntary Workforce Reduction
    - Do to avoid a RIF
    - What if your best performance resign?
- Focus on jobs and job functions

Dos and Don’ts in Implementing a RIF

- How to document
- Documentation is key (but again, consider privilege)
- Documentation leads to reasoned decisions
- In addition, should litigation arise, it will often be long after memories have faded
- Documentation will help to prove the legitimate and individualized nature of the decisions

Dos and Don’ts in Implementing a RIF

- What about employees on a leave?
- What about employees who have complained of discrimination and harassment?

Questions?

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