LABOR & EMPLOYMENT LAW SEMINAR

REDUCTIONS IN FORCE
Developing an Effective Strategy and Managing Your Legal Risks

January 6, 2009
Goodwin Procter Conference Center

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Westin Waltham
The materials contained in this booklet are only a generalized discussion of areas of legal concern. Every employer’s situation is in some way unique and the discussions contained in this notebook may not adequately deal with each employer’s circumstance. As a result, these materials cannot and do not purport to provide an answer to apparently similar problems. The materials should not be construed as legal advice or legal opinion, which can be rendered properly only when related to specific facts. This publication may be deemed advertising within the meaning of SJC Rule 3:07, Massachusetts Rules of Professional Conduct 7.3.

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REDUCTIONS IN FORCE:
Developing an Effective Strategy and Managing Your Legal Risks

Goodwin Procter LLP
Labor & Employment Law Practice

January 2009
Polly disagrees that a RIF is necessary. She believes that other steps—like a voluntary early retirement program—should be considered before the company begins laying people off. Polly wants to speak to her lawyer about the various options available to the company.
Layoff or Not?
RIF Alternatives

- Hiring Freeze
- Cutting contractors
- Voluntary Severance Plans
- Voluntary Early Retirement Plans
- Salary Reductions
- Shortened Workweeks
No Bail Out For Us, Inc.: Continued

Polly has received data that Product A’s sales continue to be fairly strong, but that sales for Product B are slow enough that the company will likely discontinue Product B altogether. One hundred employees focus exclusively on the manufacturing, sale or service of Product B. Sales numbers for Products C and D are mediocre, but their production is necessary for a large, longstanding client.
Designing RIF Selection Criteria

- Planning for your future business needs
- Developing criteria that are consistent with those needs
- Identifying the decision makers – talking to the right people while maintaining necessary confidentiality
- Developing documents providing appropriate information to decision makers to facilitate selection
- Designing training and guidance materials
- Real world v. best practices
Designing RIF Selection Criteria – Dos and Don’ts

- Do be consistent and job-related
- Do use only the selection criteria established by the company
- Don’t base decisions on consideration of age, race, gender, pregnancy or other protected status
- Don’t select an employee because he or she is retirement eligible, on a leave of absence, has a part-time schedule or other flexible work arrangement.
No Bail Out For Us, Inc.: Continued

- Ima Problem, a factory supervisor in No Bail Out’s Massachusetts factory, is pregnant and is about to go out on her FMLA maternity leave. She has told her supervisor that she “wished she had more time to spend with the baby.” Ima supports Product B, which the Company may discontinue.

- Larry Longtimer is 63 and has been at the company for 20 years. He has advanced design knowledge in Product B that could be easily applied to Product A. He has two grandchildren that he wishes he could see more and an ailing wife who needs constant care.
No Bail Out For Us, Inc.: Continued

• Debbie Doolittle was placed on a performance improvement plan last month for low productivity and poor attendance. She was given 90 days to turn things around or face the prospect of termination.

• Ronald Retaliation is a chronic complainer about everything at the company. Recently he has come forward and suggested that not only is his pay inadequate, but that the pay of his fellow workers is below industry standards. He told Polly six months ago that the company needs to do something about it. Three months ago he received a bad performance review, which criticized him for, among other things, not being a team player.
Addressing Difficult Situations

• Finding hidden problems by using a RIF checklist
• Employees who have filed a claim, grievance or internal complaint against the company
• Employees on leaves of absence
• Volunteers
• Pregnant employees
• Employees who are on a performance improvement plan
• Employees at or near retirement age
• New hires/pending offers
In 2008, Polly implemented a forced ranking system that required managers to place 10% of their employees in the Needs Improvement category, 70% in the Meets Expectations category, and 20% in the Outstanding category. At the time of the layoff, 60% of No Bail Out’s 4,000 employees were 40 or over, but 75% of those who received Needs Improvement reviews in 2008 were 40 or over.
Legal Review

• Testing for pretext
• Testing for over selection of protected classes
  – Consideration of age bands
• Finalizing non-privileged documentation
No Bail Out For Us, Inc.: Continued

Of No Bail Out’s 4,000 employees, 2,000 of them have been with the company for over ten years and 60% are 40 or over. When Polly reviews all of the decisions made by the managers, it appears that 80% of the individuals selected for the layoff are 40 or over.
Statistical Review

• Determining the relevant statistics
• Conducting statistical analyses
• Understanding risk and making decisions to minimize risk
No Bail Out For Us, Inc.: Continued

The 100 employees working on Product B work in the New Bedford, Massachusetts plant that has 1,000 employees. Those 100 will be laid off. In addition to those 100, another 100 employees are being laid off from the New Bedford plant. Polly does not think this triggers any additional legal obligations.
WARN

- Coverage
- Plant closings and mass layoffs
- Compliance
- Penalties
- State plant closing laws
Severance Payments

• Calculating the amount of severance to be offered
• Seeking a release
• Consideration for the release
  – Severance pay
  – Benefit continuation
  – Outplacement
• Updating severance pay plans
Polly understands that the overarching goal of the OWBPA is to provide information to older employees so that they can make educated judgments about whether to sign a release. She therefore decides that the decisional unit for her RIF is the entire company and generates an OWBPA disclosure that contains information on all 4,000 employees. Her disclosure explains the eligibility factors for the severance plan and provides employee’s titles and birthdates.
Meeting OWBPA Requirements

• OWBPA Coverage
  – Involuntary employment termination programs
  – Voluntary exit incentive programs

• OWBPA Requirements
  – Clear and unambiguous language
  – Specific reference to ADEA
  – No waiver of future claims
  – Consideration
  – Instruction to consult an attorney
  – 45-day consideration period
  – 7-day revocation period
  – No restriction on EEOC investigations
OWBPA Disclosure Requirements

• Defining the decisional unit
• Addressing eligibility factors for layoff
• Identifying time limits
• Listing selected and not selected job titles
• Providing age information for all titles
• Dealing with the multi-stage RIF
• Presenting information clearly
Challenges to Layoff Decisions

- Disparate treatment
- Disparate impact
- Class claims
- Pattern or practice claims
- ERISA
- Breach of contract claims
Logistics

• Company-wide coordination
• Employee notification
  – Remote employees
• Security
• Dealing with layoff “survivors”
TEN LESSONS

1. Consider and implement alternatives to a RIF to establish credibility and reduce risk
2. Think about positions/business needs first – individuals second
3. Develop realistic criteria and then follow them
4. Improve your performance reviews – you may need to rely on them
5. Think through and control the documentation of your processes
TEN LESSONS: Continued

6. Involve the right level of managers and train them to apply the criteria consistently
7. Use counsel early and often to identify legal risk and provide a defense
8. Analyze statistics thoughtfully
9. Identify WARN/notice issues
10. Take the necessary steps to secure an OWBPA-compliant release of claims
Questions?
REDUCTIONS IN FORCE: Developing an Effective Strategy and Managing Your Legal Risks

Goodwin Procter LLP
Labor & Employment Law Practice

January 2009
HYPOTHETICAL

No Bail Out For Us, Inc. makes four different types of products (Product A, Product B, Product C, and Product D). The company has 3,900 employees working at various sites in Massachusetts and 100 sales representatives in various states throughout the country. The employees are not unionized. They receive annual written reviews and occasional oral reviews from their managers as performance issues arise.

The demand for No Bail Out’s products has decreased significantly in the past year, and dramatically in the past three months. No Bail Out has tried to market its products to other companies in the United States and internationally, but has not met its sales targets. Now it has an oversupply of product, too many product engineers, supervisors, and related administrative personnel to support its declining business, and not enough substantial orders to fill.

No Bail Out’s CEO, Penny Lane, meets with the Board of Directors, which has concluded that a reduction in force is necessary to keep the company afloat. The Board concludes that a 10% reduction must be made and asks the company’s senior human resources director, Polly Planner, to plan and implement a RIF of 400 employees in the following month. The Board tells Polly it doesn’t have time to come up with any selection criteria for her, but emphasizes that she needs to lay off 400 employees as quickly as possible.

Finally, Polly has received data that Product A’s sales continue to be fairly strong, but that sales for Product B are slow enough that the company will likely discontinue Product B altogether. One hundred employees focus exclusively on the manufacturing, sale or service of Product B. Sales numbers for Products C and D are mediocre, but their production is necessary for a large, longstanding customer.
GOODWIN PROCTER LLP

LABOR & EMPLOYMENT LAW SEMINAR

~TOPIC~

“Reductions In Force - Developing an Effective Strategy and Managing Your Legal Risks”

~SPEAKERS~

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Goodwin Procter LLP
Conference Center
Tuesday, January 6, 2009
8:00~10:00 a.m.

and

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70 Third Avenue
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Thursday, January 8, 2009
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# Table of Contents

I. Organization and Assessment: Layoff Procedures .............................................................. 1
   A. The Decision to Conduct a Layoff – Considering Alternatives ............................... 1
      1. Hiring Freeze, Contractors and Voluntary Severance Programs ................ 1
      2. Voluntary Early Retirement Programs (“VERP”) ...................................... 2
         (a) Criteria for Eligibility ..................................................................... 2
         (b) Voluntariness .................................................................................. 2
      3. Salary Reductions and Shorter Workweek ................................................. 3
   B. Planning an Involuntary Layoff...............................................................................3
      1. Identify the Reason for the Layoff.............................................................. 4
      2. Determine Which Categories of Individuals Will be Impacted.................. 4
      3. Establish a Consistent, Formal Approach................................................... 4
      4. Deciding What Benefits to Offer Employees ............................................. 4
         (a) Severance Benefits.......................................................................... 4
         (b) Outplacement Assistance................................................................ 5
         (c) Noncompetition Agreements .......................................................... 5
         (d) Vacation, Stock, Bonuses ............................................................... 5
   C. The Selection Process ..............................................................................................5
      1. Use Business-Related Factors..................................................................... 6
         (a) Non-Essential Positions .................................................................. 6
         (b) Seniority.......................................................................................... 6
      2. Performance as a Factor.............................................................................. 6
      3. Do Not Consider Impermissible Factors/No Demographic Information ........ 7
      4. Difficult Situations...................................................................................... 7
         (a) Employees Who Have Filed A Claim, Grievance or Internal Complaint Against the Company .................................................. 8
         (b) Employees Who Have Notified The Company They Are Pregnant ......................................................................................... 8
         (c) Employees on Protected Leave....................................................... 9
         (d) Employees Who Are on a Performance Improvement Plan .......... 9
         (e) Employees at or near Retirement Age ............................................ 10
         (f) “Volunteers” .................................................................................. 10
         (g) New Hires/Pending Offers............................................................ 10
   D. Training Managers to Make Appropriate Selections ............................................. 11
   E. Decisionmaking and Documentation.....................................................................11
      1. Statistical Analysis.................................................................................... 12
         (a) Assessing Statistical Disparities ................................................... 13
         (b) Curing a Statistical Disparity ........................................................ 13
   F. Communicating to Employees...............................................................................14
      1. Company-Wide Coordination................................................................... 14
      2. Employee Notification.............................................................................. 14
      3. Security ..................................................................................................... 15
      4. Layoff “Survivors” .................................................................................... 15
II. Advance Notification Obligations -- WARN Act Requirements ......................... 16
   A. The Federal WARN Act .................................................................................. 16
      1. Summary .................................................................................................... 16
      2. Coverage ................................................................................................... 16
         (a) Covered Employers ........................................................................... 16
         (b) WARN Act Events - Plant Closings and Mass Layoffs ..................... 16
            (i) Plant Closings ............................................................................. 16
            (ii) Mass Layoffs ......................................................................... 17
            (iii) Additional Considerations When Determining Whether A Plant Closing or Mass Layoff Has Occurred ................................................... 17
      3. Compliance ................................................................................................ 18
         (a) Required Notice Under WARN Act ................................................. 18
         (b) Penalties for Violating the WARN Act ............................................... 18
         (c) Exceptions To The 60-Day Notice Requirement ............................... 19
            (i) Faltering Company ....................................................................... 19
            (ii) Unforeseeable Business Circumstances .......................................... 20
            (iii) Natural Disaster ...................................................................... 20
   B. Massachusetts Plant Closing Law ................................................................... 20
      1. Summary ................................................................................................... 20
      2. Coverage ................................................................................................... 21
      3. Compliance ................................................................................................ 21
   C. Other Relevant States’ Plant Closing Laws ...................................................... 21
      1. California .................................................................................................. 21
      2. Connecticut ............................................................................................... 22
      3. Maine ........................................................................................................ 22
      4. New Hampshire ........................................................................................ 22
      5. New Jersey ................................................................................................ 23
      6. New York .................................................................................................. 23

III. Deciding Whether To Seek A Release of Claims ............................................. 24

IV. OWBPA Requirements ...................................................................................... 25
   A. Origins and Purpose of the OWBPA .............................................................. 25
   B. Coverage ....................................................................................................... 25
   C. Release Requirements ................................................................................... 26
      1. Clear and Unambiguous Language .......................................................... 26
      2. Specific Reference to ADEA ................................................................... 27
      3. No Waiver of Future Claims ................................................................... 27
      4. Additional Consideration ........................................................................ 27
      5. Instruction to Consult an Attorney ............................................................ 27
      6. 45-Day Consideration Period ................................................................... 27
      7. Seven Day Revocation Period ................................................................... 28
      8. No Restriction on EEOC Investigations in Covenants not to Sue ............ 28
   D. Disclosure Requirements .............................................................................. 28
      1. Decisional Unit ........................................................................................ 29
      2. Eligibility Factors for Layoff ................................................................... 30
3. Time Limits ............................................................................................... 31
4. Job Titles ................................................................................................... 31
5. Age ............................................................................................................ 31
6. Multi-Stage RIFs ....................................................................................... 31
7. Presentation of the Disclosure ................................................................. 32

V. Challenges to Layoff Decisions .................................................................. 32
   A. Disparate Treatment .................................................................................... 32
      1. Individual Claims .................................................................................. 32
      2. Class Claims .......................................................................................... 33
   B. Disparate Impact ......................................................................................... 34
   C. Liquidated Damages .................................................................................... 35
      1. Waiver of Attorney-Client Privilege ..................................................... 35
   D. Other Claims ............................................................................................. 35
In these challenging economic times, many employers are making the difficult decision to conduct reductions in force. The purpose of this outline is to assist employers in considering alternatives, designing and implementing a reduction in force and managing the legal risks associated with the process.

I. Organization and Assessment: Layoff Procedures

A. The Decision to Conduct a Layoff – Considering Alternatives

Prior to instituting an involuntary reduction in force, an employer may wish to consider whether alternatives could partially or completely accomplish its objectives to cut costs and reduce personnel. Such alternatives include hiring freezes, firing or reducing the number of contractors, voluntary separation programs, early retirement incentives, and salary reductions. Each of these alternatives, however, presents its own issues.

1. Hiring Freeze, Contractors and Voluntary Severance Programs

A hiring freeze either prior to or in connection with a layoff may help an employer reduce its workforce and make the RIF more palatable to current employees. Practical considerations, however, may make a complete hiring freeze unattractive. For example, an employer may need to fill certain critical positions that cannot be performed by current employees, causing it to make a number of exceptions to the hiring freeze. An employer should also consider taking a hard look at any contractors who are performing functions that could be filled by current employees.1 A common rationale for using contractors is that they can more easily be terminated when business circumstances warrant. While curtailing hiring and terminating contractors can produce some cost savings, the slowdown in voluntary attrition that accompanies an economic downturn can often offset those savings and leave employers with a need to make reductions in its current employee population. However, an employer that undertakes a reduction in force without curbing hiring or cutting back on contractors is more likely to face discrimination claims from affected employees who will assert that the reduction in force was not bona fide and that they in fact lost their jobs to new hires and contractors who are allegedly less qualified.

A general program authorizing a voluntary reduction in force may appear to be a lower risk and less painful way to downsize a workforce. One danger, however, is that key employees may take advantage of a voluntary severance program. In addition, in troubled economic times like these, it is expected that fewer employees will voluntarily abandon their job in exchange for a few weeks or months of severance.

1 There are, of course, a number of legal considerations associated with directly engaging so-called “contract” workers under federal and state law that lie outside the scope of this seminar, but which were addressed in our June 2008 Wage and Hour Law Update. Previous legal alerts can be accessed at: http://www.goodwinprocter.com/Publications/FindaPublication.aspx?id={C9E9D163-8287-4D9B-8561-5ECE3174755F}. For the purposes of these materials we assume that “contractors” have been engaged through third parties who are directly fulfilling any employment obligations due to the “contractors.”
2. Voluntary Early Retirement Programs ("VERP")

By offering a VERP, an employer may reduce or eliminate the need for involuntary layoffs, allowing the company to reduce its workforce in a manner that is less disruptive and less demoralizing to the workforce. A properly instituted VERP can also reduce the risk of litigation arising from a layoff. Such a plan could induce early retirement by continuing salary and benefits for a limited time period or extending enhanced retirement benefits. Under the Age Discrimination in Employment Act ("ADEA"), courts interpret appropriately constructed VERPs as offering an incentive to recipients rather than being discriminatory. See Fagan v. New York State Elec. and Gas Corp., 186 F.3d 127 (2d Cir. 1999) ("The existence of the early retirement plan is not evidence of age discrimination. The ADEA creates a safe harbor for voluntary early retirement plans that are ‘consistent with the relevant purpose or purposes’ of the ADEA, and the implementation of such a plan by an employer cannot serve as evidence of unlawful age discrimination."). Much like voluntary severance, however, an employer may have little control over whether key employees will take advantage of the VERP, potentially leaving the employer with losses that it cannot readily replace.

(a) Criteria for Eligibility

In creating a VERP, an employer has the opportunity to set the criteria defining which employees will be eligible. Typically, employers will provide an early retirement incentive for employees who are of a certain minimum age and have a minimum number of years of service with the company. Employers may also choose to only allow employees who are in positions that would not be filled or work in areas where there is excess capacity to be eligible for participation in a voluntary program.

(b) Voluntariness

Employees who elect early retirement may later try to challenge their retirement by claiming that the decision was not voluntary. An employee may try to show that he or she was coerced into early retirement by showing that the employer offered only a short period of time to employees to make a decision or that employees were supplied with too little information to make an informed choice. The mere fact that the employee considering early retirement is aware that there is some risk of discharge if retirement is not selected will not be sufficient to permit the employee to challenge successfully the voluntariness of the program. In Vega v. Kodak Caribbean Ltd., 3 F.3d 476 (1st Cir. 1993), for example, the court held that even though the employer stated it would have to furlough a number of employees if there were not enough volunteers, this was not sufficient to demonstrate that any particular individual was coerced into accepting the voluntary incentive.

Pointed comments made by an employer’s representative about an employee’s prospects for continuing employment, however, may affect the voluntariness of an employee’s acceptance of an early retirement offer. Employers should guard against indicating that a particular employee who does not elect to voluntarily retire will soon be terminated or from providing assurances of continued employment to other employees. See, e.g., Vebraeken v. Westinghouse Elec. Corp., 881 F.2d 1041 (11th Cir. 1989) (finding it relevant to an age-discrimination claim that employee who elected to participate in voluntary early retirement program did so after being
advised that his name had been placed on a layoff list). Of course, an employer can manage the risk associated with such claims by conditioning the employee’s eligibility for benefits under the VERP on the employee’s execution of a release. See Section III for a discussion on the legal requirements associated with obtaining a valid release.

3. **Salary Reductions and Shorter Workweek**

Many employers are also considering salary reductions and a shorter workweek in an effort to cut costs and avoid layoffs. Although these efforts can be effective, employers should take care that they do not run afoul of any wage and hour laws in taking these actions. Employees may not have their pay reduced below the applicable minimum wage. See 29 U.S.C. § 206; M.G.L. c. 151 § 1. In addition, the salary for overtime exempt executive, administrative or professional employees cannot be reduced below $455 per week ($23,660 per year) or the exemption will be lost. 29 C.F.R. § 541.300(a)(a). Employers who wish to reduce salary or shorten the workweek should take care to communicate their intentions clearly to their employees in advance of implementing any pay or workweek restrictions so that employees have ample notice for planning purposes and can be deemed to accept the new terms and conditions of employment by continuing to come to work. See, e.g., Gishen v. Dura Corp., 362 Mass. 177, 183 (1972) (“An at-will employee's decision to remain employed after his or her employer changes a term of employment constitutes an acceptance of, and provides consideration for, such change.”).

Some employers may try to boost employee morale by suggesting that employees will be compensated in the future for current pay cuts. If they use this tactic, employers should be aware that deferred compensation arrangements (e.g. arranging for employees to accept a reduced salary in the short-term in exchange for a bonus if the company’s performance exceeds current expectations or promising to make employees whole for pay cuts when economic conditions improve) may have legal and tax implications. Specifically, to avoid contract-based legal claims, employers should state clearly any plans to compensate employees in the future for current pay cuts. If the employer wishes to retain discretion to decide whether and to what extent such future benefits will be paid, the employer should make clear that such payments remain at the employer's discretion. On the other hand, if the employer wishes to make a contractual commitment, it should state the conditions, timing, and form of the future payment with clarity so as to avoid claims that may arise from ambiguities and to ensure compliance with the deferred compensation rules set by Internal Revenue Service Code § 409A.

**B. Planning an Involuntary Layoff**

If the employer has determined that an involuntary reduction in force is the most viable option to permit the company to cut costs and meet its business needs, then the employer should plan the RIF with care. If the employer is unionized, the employer should consult the applicable collective bargaining agreement to ensure it complies with rules on layoff, seniority, and recall rights.

The following preliminary steps should be followed in planning the RIF:

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1. Identify the Reason for the Layoff

First, the employer should identify the reason for the layoff. For example, does a group or function need to be substantially reduced or eliminated because of a loss of business or changing need? Alternatively, is the company looking to plan a general reduction across all functions? Also, the company should determine whether it plans to redeploy current employees whose jobs are subject to reduction into other positions that are either vacant or occupied by the RIF selectees. This process, also known as “bumping,” can permit the company to retain valuable talent from areas being substantially downsized but also can be difficult to administer.

2. Determine Which Categories of Individuals Will be Impacted

Once the company has determined how the reduction in force will impact its workforce, it should identify the criteria on which the company will rely in conducting the selection process. As discussed in more detail in Section I(C), below, typical selection criteria may include such factors as criticality of function, applicable skill set, relative performance and seniority.

3. Establish a Consistent, Formal Approach

The company should next develop a process for implementing the selection criteria. Senior management should determine at what level decisions should be made, e.g., by direct managers or by their superiors. Although the company will want to limit the extent to which it discloses its reduction plans to lower-level managers, the company needs to ensure that the individuals participating in the decisionmaking process have sufficient familiarity with the positions and employees that are being considered for reduction so that they are able to participate meaningfully in that process. The company should then develop a consistent process that will be utilized by all decisionmakers in making their selections. For example, HR should distribute to managers a spreadsheet that provides information about each employee reporting to that manager when measured against the selection criteria that the company has developed. Importantly, decisionmakers should not receive any demographic data (e.g., age, race, sex, etc.).

4. Deciding What Benefits to Offer Employees

(a) Severance Benefits

Offering severance benefits eases the financial impact of the layoff on the employee. If an employer is in a position to offer meaningful severance benefits, we recommend that employers condition eligibility for those severance benefits on an employee’s agreement to execute a release of claims, which is discussed more fully below in Section III. If an enforceable release can be obtained from all or nearly all of the employees being laid off, the legal risks associated with the reduction in force are greatly reduced. The company should establish a formula to calculate severance amounts. Usually, the formula is based on years of service, e.g., X weeks severance per year of service, or position, e.g., Vice Presidents and above receive a minimum severance amount which may be enhanced based on tenure.
(b) Outplacement Assistance

Outplacement assistance may likewise ease the impact of the layoff on the employee. It may also reduce the likelihood of litigation emanating from a layoff by making it clear that the employer is not abandoning the employee and cares about the employee’s future. Outplacement services should be extended in connection with a release of claims, as discussed more fully below in Section III. Outplacement services take various forms, ranging from assistance with resume writing and career planning to instruction in job-finding techniques and interviewing skills.

(c) Noncompetition Agreements

Employers conducting a layoff are often faced with the question of whether or not to hold employees to their obligations under existing noncompetition or nonsolicitation agreements. Employers should consider their legitimate business interests in making this determination. Because noncompetition agreements usually contain strong confidentiality and return of property provisions, however, if the company elects to release or modify an employee’s obligations under his or her noncompetition agreements it should be careful to preserve other important sections of the agreement, such as those relating to confidentiality, intellectual property or return of property. If an employer elects to require a laid off employee to comply with noncompetition obligations, it should be aware that doing so will diminish its ability to argue in litigation that the employee failed to mitigate his damages by not getting a job. Also, employers should note that releasing employees from their noncompetition or nonsolicitation obligations can serve as consideration to support a release of claims.

(d) Vacation, Stock, Bonuses

Employers also need to consider how they are going to handle vacation time, stock, and bonuses. State law normally governs an employer’s obligation with respect to vacation pay. In Massachusetts and California, employers are required to pay an employee for all accrued but unused vacation pay on the date of termination. If employers operate in other states, applicable local law should be consulted. With respect to stock, normally employers handle stock and stock options in accordance with the terms of the applicable stock plans. To the extent that any amendments to equity plans are contemplated, employers should seek professional advice regarding accounting and disclosure requirements. Finally, with respect to bonuses, an employer should review its bonus plan to determine whether laid off employees are entitled to any bonus payments. While some policies require employees to be actively employed on the date bonuses are paid, other policies do not have that requirement so that if a bonus was earned it would need to be paid regardless of whether the employee was employed on the payment date. State law should be consulted to ensure compliance with specific wage payment laws.

C. The Selection Process

Employers usually make layoff decisions based on some combination of objective and subjective factors. Even though the straight-forward application of an objective factor such as the elimination of a position will generally protect an employer from discrimination claims, an employer should be sure that it applies such a factor consistently. When relying on factors that
require some subjective judgments like job performance or skill set, the employer should take
steps to consider whether its assessments are consistent with prior documentation and
communications to the employee. Whatever factors are selected, they should be clearly defined,
consistently applied, reasonable and related to business goals and objectives prior to the selection
of any employees for termination.

1. Use Business-Related Factors

(a) Non-Essential Positions

If an employee’s position is eliminated and the elimination is done in a neutral manner,
an employee will most likely not be able to establish a prima facie case of discrimination. See,
e.g., Currier v. United Technologies Corp., 393 F.3d 1735 (1st Cir. 2004) (establishing a prima
facie case of discrimination requires a plaintiff to demonstrate, among other things, that an
employee who is not a member of the protected class was retained in the same position
previously held by the plaintiff); Connell v. Bank of Boston, 924 F.2d 1169 (1st Cir. 1991)
(finding employee who was not replaced and whose position was eliminated as a result of a
reorganization was not subject to unlawful discrimination).

(b) Seniority

An employer’s use of inverse seniority to reduce the workforce tends to favor older
workers and therefore reduce the risk of age discrimination claims. In the absence of a union
contract, most employers resist reliance upon seniority to make layoff decisions because they
prefer merit-based considerations such as relative performance and skill set. Moreover,
protecting senior workers may have a negative impact on an employer’s efforts to increase the
percentage of women and minorities in the workforce. Although seniority can be an objective
factor for making decisions, many employers decline to use it, or invoke it only as a tie-breaker
when other merit-based factors appear nearly equal.

2. Performance as a Factor

Utilization of performance-related criteria may force the employer to defend the
reliability of its performance appraisal systems. Therefore, if subjective performance criteria are
used, an employer should conduct and rely upon a thorough evaluation process that considers
valid performance-related factors that have been used in past performance appraisals.

A particular concern with the use of performance evaluations is whether the evaluations
themselves are tainted with discriminatory bias. In Thomas v. Eastman Kodak, 183 F.3d 38 (1st
Cir. 1999), for example, the plaintiff’s performance appraisal scores dropped significantly after
being assigned to a new supervisor whom he alleged was biased against him because of his race.
The plaintiff was eventually selected for layoff as a result of these low scores. The court found
that the plaintiff had produced enough evidence to survive summary judgment on a disparate
treatment claim because of the allegation that the low performance scores were tainted by bias.

Many employers would like to rely on documented performance appraisals that pre-date
the RIF to support decisions to select poor performers for termination. Unfortunately, managers
often fail to give candid performance reviews making it difficult to draw distinctions among employees based on performance ratings when the time comes to implement a RIF. Some employers attempt to remedy this situation by directing managers to force employees into a predetermined distribution so that a certain percentage of workers must be assigned the lowest rating. These so-called forced ranking initiatives are frequently challenged as efforts to drive older workers or other protected categories of employees from the organization. It is therefore important to make sure that managers are well-trained in making defensible ratings and that ratings are monitored for possible disparate impact. When “forced ranking” is done contemporaneously with the RIF and the forced rating differs from prior ratings, employers can expect employees to challenge the legitimacy of the new rating, particularly if a protected category of employees has been downgraded. Employers should carefully examine employee evaluations to ensure that they support the ranking each employee receives.

3. **Do Not Consider Impermissible Factors/No Demographic Information**

Under no circumstances should the criteria for selecting employees to be included in a reduction in force include any demographic information or other impermissible factors, including those discussed below in Section I(B)(4) (see also Section I(E)). Indeed, to counter any claim of discrimination, guidance to managers should expressly prohibit consideration of unlawful criteria. This guidance can help to defend against claims that an employer had a policy of discrimination and can be invoked to try to defeat attempts to certify a class. *See, e.g., West v. Border Foods, Inc.*, No. 05-2525, 2006 U.S. Dist. LEXIS 96963, at *27 (D. Minn. 2003) (decertifying a class in part because “the alleged violations are contrary to the Defendants' official written policy”); *Ulvin v. Northwestern Nat'l Life Ins. Co.*, 141 F.R.D. 130, 131 (D. Minn. 1991) (dismissing class allegations in part because the employer’s “plan to reduce the work force specifically provided that age may not be a factor in any termination decision”).

4. **Difficult Situations**

When selecting employees to be included in a reduction in force, there are specific situations that can pose higher risk for employers. Employees in the following categories require particular consideration prior to termination. As described below, employers are not prohibited from including these employees in the reduction in force, but employers should be cautioned that economic reasons for a layoff do not insulate the employer from liability under theories such as discrimination, retaliation or wrongful discharge in violation of public policy. *See, e.g., Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1136 n. 11 (9th Cir. 2003) (“Where a plaintiff alleges that she was terminated for unlawful reasons, courts will not accept a reduction in force as the conclusory explanation for the employee’s termination.”); *Hoggens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998) (“Even if an employer’s actions and articulated reasons are facially neutral (e.g., a RIF), if in reality the employer acted for a prohibited reason (e.g., retaliation for exercising a protected right), then its asserted legitimate reason for the RIF and its ostensibly nondiscriminatory selection criteria as to who gets RIFed cannot insulate it from liability.”).
(a) Employees Who Have Filed A Claim, Grievance or Internal Complaint Against the Company

Employers cannot retaliate against employees who have filed a claim, grievance or internal complaint against the company by selecting the employee for termination in a reduction in force. Under state and federal law, employers are prohibited from retaliating against employees who have filed a charge or made a complaint of discrimination. For example, Title VII of the Civil Rights Act of 1964 prohibits employers from penalizing an employee who “has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or litigation under this subchapter.” 42 U.S.C. § 2000e-3(a). Similarly, Section 806 of the Sarbanes-Oxley Act creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in protected whistleblowing activity. 18 U.S.C. § 1514A. When an employee who has previously made a complaint of discrimination, retaliation or wrongdoing has been identified for inclusion in a reduction in force, the employer should give careful consideration to the objective or subjective factors that support the selection. Obviously, reliance on objective factors like function elimination render such a selection more supportable. The employer also should give careful consideration to the amount of time that has elapsed since the employee made his or her complaint. The more recent the event, the more likely an inference of retaliation will be applied in any court proceeding. Compare Wyatt v. City of Boston, 35 F.3d 13 (1st Cir. 1994) (stating that “[o]ne way of showing causation [for a claim of retaliation] is by establishing that the employer’s knowledge of the protected activity was close in time to the employer’s adverse action”) and Calero-Cerzo v. U.S. Dept. of Justice, 355 F.3d 6 (1st Cir. 2004) (finding adverse employment action taken approximately one month after employee’s filing of complaint was sufficient to establish prima facie case of retaliation under Title VII) with Lewis v. Gillette Co., 22 F.3d 22 (1st Cir. 1994) (finding no retaliation where employee failed to establish causation as termination occurred two years after employee’s protected testimony against employer at a race discrimination hearing).

(b) Employees Who Have Notified The Company They Are Pregnant

Employers cannot base a decision to terminate a woman on the basis of her pregnancy. Additionally, employers cannot assume an employee would like to be included in a reduction in force in order to spend more time at home with her child. See, e.g., McDonnell v. Certified Engineering, 899 F. Supp. 739 (D. Mass. 1995) (holding that plaintiff established a prima facie case of gender discrimination where she provided evidence that she was notified of her inclusion in a reduction in force immediately after informing her supervisor of her pregnancy). Of course, the employer can rebut the prima facie case by demonstrating that legitimate business considerations, apart from the pregnancy, justified including the employee in the RIF. See, e.g., Christina Weston-Smith v. Cooley-Dickinson Hospital, Inc., 153 F.Supp. 2d 62 (D. Mass 2001) (holding that plaintiff who had just returned from maternity leave was not unlawfully discriminated against when she was laid off as part of a reduction in force where the hospital restructuring “had an independent, rational basis”).
(c) Employees on Protected Leave

Upon return from FMLA leave, “an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.” 29 C.F.R. § 825.214(a). However, an employee on FMLA leave “has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.” 29 C.F.R. § 825.216(a). Therefore, when an employer terminates an employee on FMLA leave as part of a reduction in force, the employer “must be able to show that [the] employee would not otherwise have been employed at the time reinstatement is requested.” Id.

Likewise, an employer cannot include an employee in a reduction in force because the employee is on a leave of absence as a reasonable accommodation under the Americans with Disabilities Act. As is the case with employees on FMLA leave, however, such employees have no greater right to reinstatement or protection than if they had not been on a leave of absence.

Some state statutes afford employees similar protections. For example, the Massachusetts Maternity Leave Act (“MMLA”) provides that a woman who is on maternity leave, including leave for adoptions, “shall be restored to her previous, or a similar, position with the same status, pay length of service credit and seniority, wherever applicable, as of the date of her leave,” Mass. Gen. Laws c. 149, § 105D. The MMLA, however, is more specific than the FMLA regarding an employer’s treatment of employees on maternity leave with regard to a reduction in force. The MMLA specifically states that an employer is not required “to restore an employee on maternity leave to her previous or a similar position if other employees of equal length of service credit and status in the same or similar position have been laid off due to economic conditions or other changes in operating conditions affecting employment during the term of such maternity leave.” Id. Consistent with the FMLA, courts have held that the MMLA does not create job security for an employee who would have been laid off in the absence of her leave. Thus, in determining whether an employee on an MMLA leave may be included in a reduction in force, the employer should consider whether the employees with the same tenure and “status” have also been selected for layoff. In determining whether a position has the same “status,” the Massachusetts Commission Against Discrimination (“MCAD”) considers several factors, including reporting relationships, title, and job duties and responsibilities. See MCAD Maternity Leave Act Guidelines, available at http://www.mass.gov/mcad/maternity1.html.

(d) Employees Who Are on a Performance Improvement Plan

An employee who is not meeting an employer’s performance expectations will generally be unable to state a prima facie case of discrimination under state and/or federal anti-discrimination statutes. An employee who has been placed on a legitimate performance-improvement plan is, by definition, not meeting his or her employer’s expectations and, therefore, may have difficulty sustaining a discrimination claim. In Mobley v. Allstate Ins. Co., 531 F.3d 539 (7th Cir. 2008), for example, the plaintiff had been placed on a performance improvement plan six months prior to a reduction in force. At the time of the reduction in force, the employee was still not meeting performance expectations. Accordingly, the court found that the employee could not establish the elements of a case of disability discrimination. (See Section
I(C)(2) for additional considerations regarding the use of performance as a factor in the selection process).

In drafting performance improvement plans, however, employers should be cautious not to create a definite period of employment in which to correct the performance deficiency. A performance improvement plan that gives an employee a specific amount of time to improve his or her performance, without any caveat for employer discretion to terminate the employee at any time, may allow an employee to claim that she had a contract of employment for the duration of the performance improvement plan.

(e) Employees at or near Retirement Age

Employers cannot assume that employees at or near retirement age would want to accept a severance package as part of a reduction in force. Employers also are cautioned from asking these employees whether they are interested in retiring or being selected for the reduction in force. An employee may be able to use such a question as evidence of age discrimination. See, e.g., Greenberg v. Union Camp Corp., 48 F.3d 22 (1st Cir. 1995) (concluding that repeated or coercive inquiries by an employer about an employee’s retirement plans can give rise to a reasonable inference of anti-age bias).

(f) “Volunteers”

Prior to instituting a reduction in force, employers should decide whether volunteers will be accepted. If volunteers are to be accepted, a clear process should be articulated that sets out the criteria for how volunteers will be considered and accepted or rejected. As discussed in Sections I(C)(4)(b) and (e), employees cannot be solicited selectively on the basis of their being pregnant, at or near retirement age, or any other protected characteristic. Employee decisions to volunteer for severance should be well documented, specifically including the voluntary nature of the decision.

(g) New Hires/Pending Offers

The company should determine whether it will rescind any current offers of employment that are pending. Although such an action may allow the company to retain more current employees, it can have a very negative effect on future recruiting efforts. In addition, an employee who has an offer rescinded could potentially bring a claim for breach of an oral contract promising employment. See, e.g., Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990) (holding that, regardless of whether the ultimate employment would have been at-will was immaterial to whether the contract for the promise of employment was breached before employment began). Other courts have upheld claims by potential employees for promissory estoppel, where the applicant relied to their detriment on the promise of the job offer. See, e.g., Peck v. IMedia, Inc., 679 A.2d 745 (N.J. Super. Ct. App. Div. 1996) (holding employee could present promissory estoppel claim to jury where she moved from Boston to New Jersey and gave up her business in reliance on the promise of a job offer); Filcek v. Norris-Schmid, Inc., 401 N.W.2d 318, 319 (Mich. App. 1986) (“[P]laintiff had a cause of action since the employee gave up his employment relying on the defendant's promise of employment.”); McAndrew v. School Committee of Cambridge, 480 N.E.2d 327 (Mass. App. 1985) (holding
plaintiff was entitled to enforce promise that, barring some valid reason, his name would be submitted to the superintendent and school committee to confirm his teaching position. Generally, damages in such cases are limited as a result of the "at-will" nature of employment, but courts have found employers liable for actual expenses incurred by the prospective employee in their reliance on the promise of employment. See, e.g., Peck, 679 A.2d at 753 (holding that allowing expectancy damages for future wages would be inconsistent with the nature of at-will employment but concluding that "there may be losses incident to reliance on the job offer itself."); McAndrew, 480 N.E.2d at 333 (holding measure of damages should be limited to those expenses incurred prior to his discharge, including the cost of moving his family from Georgia to Boston).

D. Training Managers to Make Appropriate Selections

Once the company has developed the selection criteria, it should train its decisionmakers as to the meaning of those criteria and how to implement them using the forms that the company has designed for the RIF process. Some courts have concluded that an employer’s failure to provide guidance to evaluators indicates unlawful discrimination. Compare Christie v. Foremost Ins. Co., 785 F.2d 584 (7th Cir. 1986) (age discrimination could be inferred from evidence showing employer did not follow its reduction in force policy and decisionmaker was unaware of policy), with Stendebach v. CPC Int’l, Inc., 691 F.2d 735 (5th Cir. 1982) cert. denied, 461 U.S. 944 (1983) (no discrimination found where layoff committee made its decision based on 18 objective criteria and final score for overall ratings). As discussed earlier, decisionmakers also should be specifically instructed that they should not base their selection decisions on any impermissible factors like age, race, gender, ethnicity, pregnancy, disability, leave status or any other category protected by law.

E. Decisionmaking and Documentation

Employers should be very careful when developing documentation for a reduction in force. Ideally, counsel should be brought in at the beginning of the process to ensure legal risk is minimized and documentation is appropriately protected by the attorney-client privilege. Counsel should play a role in developing or approving the RIF criteria, to ensure that they are job-related and as defensible as possible and that managers are instructed not to consider protected categories such as age, race, or sex in the decisionmaking process. Counsel should also assist with developing RIF processes and procedures to ensure legal risk is minimized. All

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2 When in-house counsel perform these roles, counsel should distinguish between their role giving business advice (which is not privileged) and their role providing legal advice (which is privileged). In-house counsel should be aware of a possible challenge to the applicability of the privilege to communications that appear to contain more business advice than legal advice. See, e.g., Borase v. M/A COM Inc., 171 F.R.D. 10 (D. Mass. 1997) (noting that the privilege applies to in-house counsel’s performance of legal work, not to non-legal work such as the “rendering of business or technical advice unrelated to any legal issues”); Coleman v. American Broadcasting Cos., 106 F.R.D. 201, 205 (D.D.C. 1985) (“communications between an attorney and another individual which relate to business, rather than legal matters, do not fall within the protection of the privilege.”). This includes termination decisions made within the counsel’s office where counsel’s business decisions about whom to terminate are not likely to be privileged. Documents containing legal advice should be clearly marked as such and labeled attorney-client privileged.
documentation regarding criteria, processes, procedures and preliminary decisions should be created for and reviewed by counsel before being finalized.

Once the process to be followed is established and finalized, management should provide a non-privileged document to lower level managers and/or decisionmakers (reviewed and approved by counsel) that explains the process they should follow and the relevant criteria they should apply. After they receive instructions from upper management, decision-makers should think carefully about their decisions and discuss them with management and counsel. All documentation should be generated for counsel’s review until decisions are finalized. Managers should be cautioned about careless communications in emails that could reflect poorly on the entire process.

Once the preliminary management review is complete, counsel should be engaged to review the tentative termination decisions to assess the risk of legal exposure. In discussing the lay-off decisions with the decision-makers, counsel will want to review any relevant documents justifying the individual decisions as well as demographic information about the population subject to the reduction in force and the population selected for termination. Only counsel, or those acting at the direction of counsel for the purpose of providing the company legal advice, should review the demographic data. If decision-makers review the demographic data, this could be used as evidence to suggest that the demographic information was a factor in the decision-making process and thus that some type of discrimination occurred. *Armbruster v. Unisys Corp.*, 32 F.3d 768 (3rd Cir. 1994).

Once decisions are finalized, the best practice is to create a non-privileged document that clearly and carefully explains the specific, non-discriminatory reasons for selecting employees for termination. This document should be created in a manner agreed upon by upper management (e.g., using a particular form or spreadsheet and providing particular information, including the basis for each individual termination). The document explaining the decisions should be created for the purpose of preserving a business record about the basis for the RIF decisions. This document will not be attorney-client privileged. If the selection of an employee is challenged, the employer should be able to explain why one employee was selected over others. *Cruz-Ramos v. Puerto-Rico Sun Oil Co.*, 202 F.3d 381, 385 at fn 3 (1st Cir. 2000).

The goal of this process is to protect the employer’s communications with counsel regarding legal risk while also creating a non-privileged record that can be used to justify and explain the RIF decisions. Were the matter to proceed to litigation, the employer would have a non-privileged record that explained the legitimate, non-discriminatory basis for each decision.

As discussed in greater detail in the next Section, in order to assess adverse impact, counsel’s review of the process may entail a statistical analysis of RIF demographic data.

1. **Statistical Analysis**

Once a proposed list of employees to be terminated has been created, the employer, together with legal counsel, may wish to conduct a statistical analysis of this list to determine whether the proposed RIF might leave the employer vulnerable to a discrimination claim. It is imperative that such analysis be conducted subject to the attorney-client privilege.
(a) Assessing Statistical Disparities

Courts usually look to statistical experts to interpret whether employees in a protected group were selected for termination in a RIF at such a disproportionately high rate to their presence in the relevant employee population that random chance would not explain the outcome. Plaintiffs’ lawyers tend to argue that all employees within a given organization should be presumed to have an equal chance of being laid off so that disparities that cannot be explained by random chance should be attributed to discrimination based upon protected class status. When comparing a large group of affected employees, relatively small differences between the rate that employees are selected for a RIF and their proportion of the allegedly relevant employee population can appear to be statistically significant. See, e.g., Taylor v. Teletype Corp., 648 F.2d 1129, 1133 (8th Cir. 1981) (finding that a slight disparity between the percentage of African American employees who were terminated compared to the percentage in the work force as a whole constituted evidence of discrimination).

Many courts have recognized, however, that comparisons need to be focused on employees who have common characteristics that are relevant to the RIF decision-making process such as job title and function and performance rating. See Scheer v. Best Buy Enter. Servs., No. 05-1275, 2006 U.S. Dist. LEXIS 65447, at *25 (D. Minn. Sept. 13, 2006) (rejecting analyses that “group together employees of varying skills and specialities” in favor of statistics that “analyze[] the treatment of comparable employees” within sub-sets of the decisional unit). When the comparisons are more tightly focused, the disparities in the selection rate often shrink and the smaller population size makes it more difficult for plaintiffs to show that the disparity is statistically significant.

In order to be useful, statistical analysis requires the use of proper protected group categories. When separately calculating the statistics for race, sex, age, and other protected categories certain employees will likely need to be included in more than one protected class. Further, the statistical analysis should individually analyze the RIF’s impact on older employees within 5 to 10 year age bands, since the termination of a disproportionate number of employees over age 50 or 60 might be actionable even if there were no disproportionate impact on protected employees in slightly younger age groupings. See Moore v. Sears, Roebuck and Co., 464 F. Supp. 357, 366 (N.D. Ga. 1979) (holding that because “age is a relative rather than absolute status when taken as a basis for discrimination, it need not follow that all persons protected by the act be grouped together for purposes of delineating the extent of their protection”).

(b) Curing a Statistical Disparity

Plaintiffs can use statistical evidence to establish individual disparate treatment claims, pattern or practice claims, or disparate impact claims. See Section V. Thus, in evaluating the legal risks associated with a RIF, employers may wish to engage counsel and statistical experts to assess how a plaintiff may analyze the relevant statistics and to consider how that assessment could be countered through more refined statistical analysis should litigation emerge.

If a statistically significant disparity is found, it is important for counsel to determine if the disparity results from any bias or practice and to attempt to correct such actions before they occur. If counsel has not already been involved in reviewing individual RIF decisions, it may be
advisable for counsel to carefully review individual selection decisions to ensure that RIF selection criteria have been properly applied. It is important to generate and analyze statistics in an attorney-client protected manner, since evidence of an employer’s failure to take action after discovering a statistically significant disparity could cause a court to find a willful or intentional violation of relevant discrimination statutes, resulting in an enhanced damages award. See, e.g., *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 409-410 (5th Cir. 1989) (affirming a willful violation verdict because the employer’s failure to discuss or take action concerning a “reorganization plan’s age impact . . . represented a careless disregard or intentional avoidance of that aspect of the plan . . . [and justified a finding that the employer] set up the evaluation process merely to create the appearance that it had acted objectively and in good faith”).

While statistical reviews of final decisions may be a prudent step to test the outcome of a RIF for legal risk, the best way to manage legal risk in real time is to have individual RIF selection recommendations by line management subject to a careful attorney-client privileged review by human resources and legal counsel in each organizational unit where decisions are being made. Such a review can help to ensure that legitimate and reasonably well-documented criteria are being consistently applied and that unsupported recommendations that would result in the “over-selection” of protected class members within the organization are being rejected.

F. Communicating to Employees

An employer who is sensitive to the impact a layoff has on employees and conducts the exit process consistently and professionally may reduce the number of claims made by employees.

1. Company-Wide Coordination

Employers should develop a coherent, communication plan that can be implemented throughout the company by local or regional human resources personnel. This communication plan should include how and when employees will be notified that the company will have a layoff, what criteria will be used to select employees for layoff, whether the company is accepting volunteers for the layoff, the date on which all decisions will be finalized and communicated to employees, a detailed Q&A regarding benefits and procedures for employees and/or managers to consult, how company representatives should respond to media, investor or customer inquiries, and the name of an individual or individuals whom employees can contact with any questions.

2. Employee Notification

Wherever possible, management should conduct a two-on-one meeting with the employee being laid off. A Human Resources representative and the employee’s manager or someone else that has some familiarity with the employee’s performance should meet with the employee and explain that he or she has been selected for layoff. The reasons for selecting the employee for layoff should be carefully and succinctly explained, and debate should be avoided. All human resources personnel and managers should be trained to communicate layoff decisions to employees effectively, respectfully and kindly. They should explain the documentation provided to the employee, emphasizing the outplacement, severance and other benefits the
company is offering in exchange for a release of claims. Providing talking points is usually very
helpful to those managers who are tasked with delivering this difficult news.

Employees who are not physically located at company headquarters or the primary
business location at which layoff communications are being made (such as outside sales
representatives who may not have a “home” office) present a special challenge. Alerting them to
their layoff by phone or email is impersonal and undesirable. On the other hand, having a face-
to-face meeting with these employees often requires the employees to travel to headquarters or
for two or more individuals to travel to a pre-determined, mutually convenient location, both of
which are time consuming, awkward and costly. Nevertheless, face-to-face lay off meetings are
preferable to the extent possible.

3. Security

Employers should carefully consider the security measures they will implement during a
layoff in order to protect other employees, property, and confidential information. In order to
react quickly in case of emergency (e.g., an employee reacts violently to the news he has been
selected for layoff and begins to threaten other employees), employers should consider having a
security firm on call or having security personnel in the building while employees are notified of
their selection for layoff. These individuals can remain out of sight and in plain clothes, but
available in case they are needed. Depending on its workforce, an employer may also determine
security personnel should be present when all employees are notified and employees should be
monitored while they collect their belongings and leave the building. Monitoring employees
while they collect their belongings or escorting employees from the premises can ensure that no
confidential information is taken, but can also be an uncomfortable and sometimes degrading
experience for employees. Employees have succeeded in arguing that monitoring and escorting,
when applied to one racial category but not another, constituted discrimination. See, e.g.,
Trustees of Health and Hospitals of the City of Boston, Inc. v. MCAD, 449 Mass. 675 (2007)
(employer discriminated against five African-American female employees by monitoring them
while they were gathering their belongings and escorting them out of the building when
employer did not monitor or escort white male employee). To avoid these claims, employers
who choose to monitor or escort employees should apply their policies consistently to all
employees and ensure that all employees are treated with dignity and respect. Finally, depending
on the circumstances, it is sometimes appropriate to immediately bar laid off employees from
access to the company’s information systems. While some employers choose to permit laid off
employees access to email and voicemail to help them during their transition to other
employment, doing so increases the likelihood that a disgruntled employee will take confidential
information or damage the company’s data systems.

4. Layoff “Survivors”

The company should ensure that those employees who were not selected for layoff are
reassured that the layoff has been completed and encouraged about the future potential of the
company.
II. Advance Notification Obligations -- WARN Act Requirements

A. The Federal WARN Act

1. Summary

Under the federal Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. §§ 2101 to 2109, a covered employer must give affected employees at least 60-days notice of a “plant closing” or a “mass layoff,” unless one of three WARN Act exceptions applies. An employer who fails to provide the required notice is liable for back pay and benefits to the extent notice is not provided and may be liable for attorneys’ fees. An employer is also subject to a $500 fine for each day it fails to give advance notice to the local government.

2. Coverage

(a) Covered Employers

The WARN Act applies to employers who (1) employ 100 or more employees (excluding part-time employees); 3 or (2) employ 100 or more employees including part-time employees, who in the aggregate work at least 4,000 hours per week exclusive of hours of overtime. 20 C.F.R. § 639.3(a). Wholly owned subsidiaries who employ less than 100 employees may still be a covered employer if the parent corporation is a covered employer, depending upon the degree of their independence from the parent corporation. Factors to be considered in this determination are: (1) common ownership, (2) common directors and/or officers, (3) de facto exercise of control, (4) unity of personnel policies emanating from a common source, and (5) the dependency of the operations. 20 C.F.R. § 639.3(a)(2). Employers who do not meet this definition may still have notice requirements under state law. See Sections III - IV, infra.

The term “employee” includes active employees and those employees not currently working as a result of a temporary layoff or leave of absence who have a reasonable expectation of returning to their same job or a similar job based on industry practice, individual notice or other arrangements. 20 C.F.R. § 639.3(a). Thus, for example, individuals on child care leave or military leave are likely to be counted as employees for WARN Act purposes.

(b) WARN Act Events - Plant Closings and Mass Layoffs

(i) Plant Closings

The term “plant closing” means “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, if the shutdown results in an ‘employment loss’ during any 30-day period at the single site of employment for 50 or more employees, excluding any part-time employees.” 20 C.F.R. § 639.3(b). Under this definition, the concept of a “plant” includes not only an entire single physical facility, but also operational units within a single facility. Plants are also not limited to

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3 WARN defines part-time employees as those working fewer than twenty hours per week or only six of the preceding twelve months.
production facilities but may include retail establishments. Note that the 30-day period may be expanded in some circumstances as described in Section II(A)(3)(c) below.

(ii) Mass Layoffs

The term “mass layoff” encompasses any workforce reduction at a single site that results in an “employment loss” over any 30-day period for at least (i) 33 percent of an employment site’s employees (excluding part-time employees), provided that at least 50 employees (excluding part-time employees) are affected; or (ii) 500 employees (excluding part-time employees) at a particular site. 29 U.S.C. § 2101(a)(3). Although mass layoffs are often a subset of “plant closings,” careful attention should be paid to the statutory definitions because certain reductions in force will result in a plant closing, but not a mass layoff. For example, the shutdown of a department with 55 full-time employees located within a larger facility that has 250 full-time employees would probably be a plant closing, but would probably not be a mass layoff. In addition, the layoff of 100 part-time employees (as defined for WARN Act purposes) at a store with 200 full-time and 200 part-time employees would be neither a plant closing nor a mass layoff. Note that the 30-day period may be expanded in some circumstances as described in Section II(A)(3)(c) below.

(iii) Additional Considerations When Determining Whether A Plant Closing or Mass Layoff Has Occurred

In determining whether a plant closing or mass layoff has occurred or may occur, only “employment loss[es],” which include employee terminations, layoffs exceeding six months and 50 percent reductions in hours during each month of any 6-month period are counted. 29 U.S.C. § 2101(a)(6). An employment loss does not include discharges for cause, voluntary terminations or retirements. Id.

No employment loss occurs “if the closing or layoff is the result of the relocation or consolidation of part or all of the employer’s business and, prior to the closing or layoff (i) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or (ii) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.” 20 C.F.R. § 639.3(f)(3).

Although both plant closings and mass layoffs focus on a 30-day period in which to count employment losses, multiple layoffs within a 90-day period will be aggregated for WARN Act purposes unless the employer can show that the employment losses are the result of “separate and distinct actions and causes and are not an attempt by the employer to evade the requirements” of the WARN Act. 29 U.S.C. § 2102(d).
3. **Compliance**

(a) **Required Notice Under WARN Act**

Employees who do not have representation\(^4\) must receive written notice containing the following information in language that the employees can understand:

1. The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;

2. A statement as to whether the planned action is expected to be permanent and, if the entire plant is to be closed, a statement to that effect;

3. An indication whether or not bumping rights exist;\(^5\) and

4. The name and telephone number of a company official to contact for further information.

20 C.F.R. § 639.7(c) and (d). This written notice must be received by employees at least 60 days prior to the closing, unless an employer qualifies for one of the exemptions listed below in Section 3(c). If an employer qualifies for one of these exemptions, it must state the basis of its exemption from the 60-day notice requirement and provide as much notice as possible under the circumstances.

The employer must also notify the state dislocated worker unit and the chief elected official of the unit of local government of the city or town in which the employer is located.

(b) **Penalties for Violating the WARN Act**

Employers failing to meet the WARN Act’s notice requirement who do not qualify for one of the exemptions listed below will be liable to affected employees for back pay and benefits for up to the full 60-day notice period. 29 U.S.C. § 2104. There is currently a split among the federal courts as to whether employers are liable for up to 60 calendar days of back pay liability or only for the number of working days that would have occurred within the violation period. The majority of courts hold that the employer is liable only for the number of working days that would have occurred within the violation period. *See e.g., Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands Inc.*, 244 F.3d 1152 (9th Cir. 2001) (calculating back pay according to the amount workers would have earned had a violation not occurred); *Saxion v. Titan-C-Mfg. Inc.*, 86 F.3d 553 (6th Cir. 1996) (holding that damages are calculated by the number of working days in a violation period). The Third Circuit conversely

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\(^4\) To the extent the affected employees are unionized or otherwise represented, different and more detailed notification requirements exist. 20 C.F.R. § 639.7(c).

\(^5\) Bumping rights are those rights sometimes enjoyed by senior employees to bump more junior employees out of their positions in an effort to avoid layoff. In such a scenario, the senior person who would otherwise be laid off due to the elimination of his or her position would take the place of a more junior employee in a position not scheduled for reduction.
holds that damages are calculated by the number of calendar days in the violation period, up to 60 days. *Ciarlante v. Brown & Williamson Tobacco Corp.*, 143 F.3d 139 (3d Cir. 1998), citing *Steelworkers v. Northstar Steel Co.*, 5 F.3d 39 (3d Cir. 1993) (basing back pay calculation on the number of calendar days in the violation period rather than the number of working days).

In addition to back pay liability, employers that violate the WARN Act are liable for benefits employees would have received under employee benefit plans during the notice period. This includes the cost of any services that would have been covered under such plans. 29 U.S.C. § 2104(a)(1)(B).

Employers may also be liable for the attorneys’ fees of plaintiffs who bring a successful WARN Act claim. 29 U.S.C. § 2104(6) (giving court discretion to award attorneys’ fees to prevailing party).

(c) Exceptions To The 60-Day Notice Requirement

The WARN Act sets forth three conditions under which the 60-day notification period may be reduced. If one of these exceptions applies, the employer must give as much notice as is practicable to its employees, consistent with the requirements outlined above. This notice may, in some circumstances, be notice after the fact. It is important to note that if one of these exceptions applies, the employer must, at the time notice is actually given, provide a brief statement of the reason for reducing the amount of notice. In addition, all three exceptions are construed narrowly and the employer bears the burden of proving their applicability.

(i) Faltering Company

One of the exceptions to the 60-day notice period for a plant closing only is if the employer qualifies as a “faltering company.” 20 C.F.R. § 639.9(a). To fall within this exception, the employer must meet the following criteria:

(1) The employer must have been actively seeking capital or business at the time that 60-day notice would have been required. The employer must be able to identify the specific actions taken to obtain capital.

(2) The employer must have had a realistic opportunity to obtain the financing or business sought.

(3) The financing or business sought must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the closing. The employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enabled the employer to keep the facility open for a reasonable period of time.

(4) The employer reasonably and in good faith must have believed that giving the required notice would have precluded the employer from obtaining the needed capital or business. The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or
capital if notice were given. This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs. The actions of an employer relying on this exception will be viewed in a company-wide context. Thus, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the single facility.

20 C.F.R. § 639(a)(1)-(a)(4).

(ii) Unforeseeable Business Circumstances

The second exception to the 60-day notice period applies to both plant closings and mass layoffs and is the “unforeseeable business circumstances” exception. This exception applies if the employer suffers unforeseeable business circumstances whereby the plant closing or mass layoff occurs because of business circumstances that were not reasonably foreseeable at the time the 60-day notice would have been required. 20 C.F.R. § 639.9(b). An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstances are caused by some “sudden dramatic and unexpected action or condition outside the employer’s control,” such as a principal client’s sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, or an unanticipated and dramatic major economic downturn. 20 C.F.R. § 639.9(b)(1).

(iii) Natural Disaster

The final exception to the 60-day notice period, the “natural disaster” exception, applies to both plant closings and mass layoffs. This exception applies if a plant closing or mass layoff is a direct result of any form of natural disaster. 29 U.S.C. § 2102(b)(2)(B). Natural disasters include, but are not limited to, floods, earthquakes, droughts, storms, tidal waves, and tsunamis. 20 C.F.R. § 639.9(c)(1).

B. Massachusetts Plant Closing Law

1. Summary

In Massachusetts, an employer in business at least one year that employs 50 or more employees (full-time or part-time) during any month in the 6-month period before the actual or anticipated date of a plant closing or partial plant closing must notify the Department of Labor and Workforce Development of such plant closing. Mass. Gen. Laws c. 151A §§ 71A to 71F. Employers of twelve or more employees who relocate their operation within the state, must give notice to the commissioner of the Massachusetts Department of Labor. Mass. Gen. Laws c. 151A § 179B.

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6 The regulations implementing this statute were repealed as of January 24, 1997 because the program was not funded. 809 C.M.R. Pt. 91, announcing repeal of 430 C.M.R. §§ 7.01 – 7.06.
2. **Coverage**

A facility is defined as “a plant, factory, commercial business, hospital, institution or other place of employment located in the Commonwealth which had fifty or more employees (full or part-time), during any month in the six month period prior to the date of certification.” Mass. Gen. Laws c. 151A § 71A. The Division of Unemployment Assistance in the Department of Workforce Development should then investigate the closing and certify whether a plant or partial-plant closing has or will occur. A “plant closing” is defined as a permanent separation of at least ninety per cent of the employees within a 6-month period. Mass. Gen. Laws c. 151A § 71A. A “partial plant closing” is a permanent cessation of part of a business conducted at a facility which results in the termination of a significant number of employees and affects workers and the community in a way similar to a plant closing. *Id.* If the director certifies that a plant closing has occurred, the director is to give notice to the employer, to the union representing the employees, and to any other person or organization that the commissioner determines is an interested party. Mass. Gen. Laws c. 151A § 71B.

3. **Compliance**

Although the program is unfunded, dislocated employees are by statute eligible for reemployment assistance after a plant closing or partial plant closing. Despite the program being unfunded, employers should still notify the Department of Labor and Workforce Development of any plant closing or any closing that may be reasonably considered a partial plant closing.

When a plant closing or partial plant closing occurs, Massachusetts also requires employers to continue medical and dental benefits for 90 days or until the employee and dependents are eligible under another group plan, whichever is shorter. Mass. Gen. Laws c. 175 § 110G; c. 176A § 8D; c. 176B § 6A. This applies to both traditional indemnity insurance and non-profit hospital service corporations such as Blue Cross Blue Shield. *Id.* The employer must notify the employees of their eligibility to participate in such plans. *Id.* If an employer self-insures these benefits and uses an insurance company simply to provide administrative services, the employer would appear to have a strong argument that ERISA pre-empts the Massachusetts plant closing statute to the extent that it regulates employee benefits.

C. **Other Relevant States’ Plant Closing Laws**

1. **California**

In California, an industrial or commercial facility that employs or has employed 75 or more people in the past 12 months must notify affected workers, the state Employment Development Department, and certain local government officials when it terminates facilities, relocates plants, or conducts mass layoffs. Cal. Lab. Code §§ 1400(a), 1401(a). A “termination” is when all or most industrial and commercial operations at a covered facility cease. Cal. Lab. Code § 1400(f). A “relocation” occurs when all or most operations are moved to a site 100 or more miles away. Cal. Lab. Code § 1400(e). A “mass layoff” is a layoff affecting 50 or more employees during a 30-day period. Cal. Lab. Code § 1400(d).
If a termination, relocation, or mass layoff is taking place, the employer owes notice to those employees who have worked at the facility for at least six of the twelve months preceding the termination, relocation, or mass layoff. Cal. Lab. Code § 1400(h). The employer must give 60-days written notice to the affected employees, the state Employment Development Department, the local workforce investment board, and the chief elected official of each affected city and county. Cal. Lab. Code § 1401(a). The notices must contain the same information as required under the WARN Act. Cal. Lab. Code § 1401(b).

An employer who fails to give proper notice is liable for lost wages and benefits for the shorter of the violation period or one-half the number of days that the affected employee was employed. § 1402(a)-(b). A court also has discretion to award attorneys’ fees. Cal. Lab. Code § 1404. Additionally, employers may be fined up to $500 for each day of violation. Cal. Lab. Code § 1403.

2. Connecticut

In Connecticut, covered employers that close or relocate to another state must pay to continue group health insurance benefits for terminated workers and their dependents for 120-days or until the employee becomes eligible for other group coverage. 57 Conn. Gen. Stat. § 31-51o(a). A covered employer is one that employs or has employed at any time in the preceding 12-month period 100 or more workers. Any collective bargaining agreements supersede this law. 57 Conn. Gen. Stat. § 31-51o(c). This law does not apply to agricultural employers, construction sites, or closings due to bankruptcy or natural disasters. 57 Conn. Gen. Stat. § 31-51n(2) and (6).

3. Maine

In Maine, an employer that employs 100 or more persons (full-time or part-time) at any time in the preceding 12-month period prior to closing or relocating, must pay severance to all affected employees that have been employed by the employer for more than three years at the rate of one week’s pay for each year of employment at the establishment. Me. Rev. Stat. Ann. tit. 26, § 625-B.2-3. A “termination” is defined as the “substantial cessation of industrial or commercial operations in a covered establishment” and “a relocation” is defined as “the removal of all or substantially all of industrial or commercial operations in a covered establishment to a new location, within or without the state of Maine, 100 or more miles distant from its original location.” Me. Rev. Stat. Ann. tit. 26, § 625-B.1. In addition to the severance pay obligation, employers are required to notify employees and the municipal officers of the municipality where the plant is located in writing, not less than 60 days prior to the closing. Me. Rev. Stat. Ann. tit. 26, § 625-B.6-A.

4. New Hampshire

An employer must file a mass layoff notice with the New Hampshire Department of Employment Security if it lays off or expects to lay off 25 or more individuals in the same calendar week, for an expected duration of seven calendar days or more due to either a vacation shutdown, a holiday shutdown, or a company closure. N.H. Rev. Stat. Ann. § 282-A:45-a.
5. **New Jersey**

In New Jersey, employers of 100 or more employees must comply with notification requirements if an “establishment” will experience a transfer or termination of operations resulting in the termination of 50 or more full-time employees during any continuous period of not more than 30 days, or if the establishment conducts a mass layoff. N.J. Stat. Ann. §§ 34:21-1, 34:21-2. An “establishment” is a single place of employment, either a single location or a group of contiguous locations, operated by an employer for more than three years. N.J. Stat. Ann. § 34:21-1. A “mass layoff” is a reduction in force other than a transfer or termination of operations resulting in the termination of employment at an establishment during a 30-day period of 500 or more full-time employees, or 50 or more full-time employees who represent one-third or more of the full-time employees of the establishment. N.J. Stat. Ann. § 34:21-1.

Such employers must provide at least 60-days notice before termination to the Commissioner of Labor and Workforce Development, the chief elected official of the municipality where the establishment is located, each affected employee, and any collective bargaining units of affected employees at the establishment. N.J. Stat. Ann. § 34:21-2.2.a.

An employer who fails to give notice in the given timeframe is liable to each employee for severance pay equal to one week of pay for each full year of employment. N.J. Stat. Ann. §34:21-2.2.b.

6. **New York**

New York recently passed the New York State Workers Adjustment and Retraining Notification Act, effective February 1, 2009. N.Y. Lab. Law §§ 860 – 860-i. Under this new act, covered New York employers must provide at least 90-days notice of a mass layoff, relocation, or employment loss. N.Y. Lab. Law § 860-b. Covered employers are any business enterprises that employ 50 or more employees (excluding part-time employees), or employs 50 or more employees who work in the aggregate at least 2,000 hours per week. N.Y. Lab. Law § 860-a.3. A “mass layoff” is a reduction in force which is not the result of a plant closing and results in employment loss (excluding part-time workers) at a single site of employment during any 30-day period for at least 25 employees who represent at least 33 percent of the workforce, or at least 250 employees (excluding part-time workers). N.Y. Lab. Law § 860-a.4. A “plant closing” is 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 25 or more employees are affected (excluding part-time employees). N.Y. Lab. Law § 860-a.6. A “relocation” is the removal of all or substantially all of the industrial or commercial operations of an employer to a location fifty or more miles away. N.Y. Lab. Law § 860-a.8.

The employer must give 90-days written notice to affected employees and representatives, the state’s Department of Labor, and the local workforce investment boards established pursuant to the federal Workforce Investment Act for the locality in which the action will occur. N.Y. Lab. Law § 860-b.1. The notice must include the elements required by the federal WARN Act. N.Y. Lab. Law §860-b.2.
A covered employer who fails to give proper notice is liable for back-pay and benefits for the violation period, up to a maximum of 60 days or one-half the number of days that the employee was employed, whichever is smaller. N.Y. Lab. Law § 860-g.2. An employer may also be subjected to a civil penalty up to $500 for each violation day, up to 90 days, and reasonable attorneys’ fees. N.Y. Lab. Law §§ 860-h.1, 860-g.7. Civil actions may be instituted by an aggrieved employee, local government, or an employee representative. N.Y. Lab. Law § 860-g.7.

III. Deciding Whether To Seek A Release of Claims

When implementing a reduction in force, employers should strongly consider requiring employees to sign a release of claims in order to receive severance payments. Although releases can add administrative burdens (see Section IV regarding the requirements for releases under the Older Workers Benefit Protection Act), employers who provide significant severance benefits in excess of statutory requirements can reduce litigation risk significantly by requiring employees to sign a release as a condition for receiving the severance benefits. If a generous severance package is offered, most employees will not choose to reject the proffered benefits in favor of the uncertainty associated with filing a claim against the employer. In addition, even if an employer has been successful in avoiding claims brought in connection with prior reductions in force, it is worth noting that more frequent or larger headcount reductions will increase the likelihood that employees will be unhappy with the decisions made and may seek to file a claim. The existence of a release requirement in exchange for the employer’s severance package can dispose of this concern and provide finality.

An employee must receive consideration for a release of claims to be valid. In considering whether releases of discrimination claims other than those under ADEA are valid, courts typically apply a “totality of the circumstances” test of which one of the factors is “whether the consideration given in exchange for the employee’s waiver exceeds benefits to which the employee was already entitled by contract or law.” Davis v. Eastman Kodak Co., 2007 U.S. Dist. LEXIS 23193, at *16-17 (W.D.N.Y. 2007). To constitute a valid waiver under the ADEA, as amended by the Older Workers Benefit Protection Act (“OWBPA”), a waiver of ADEA claims must meet several requirements, including the provision of adequate consideration. 29 U.S.C. § 626(f)(1)(D). Specifically, the waiver must be signed “in exchange for consideration in addition to anything of value to which the individual is already entitled.” Id.

If an employee has a written contract or offer letter entitling him to severance benefits, the employer will need to offer the employee something more to provide adequate consideration for a release of claims. See, e.g., Piascik-Lambeth v. Textron Automotive Co., Inc., 86 Fair Empl. Prac. Cas. (BNA) 249 (D. N.H. 2000) (a release must be supported by separate consideration; question of fact existed as to whether employee was already entitled to severance pay under existing written policy). If an employer has an existing severance plan or an established practice of providing a certain level of severance benefits, these plans can be amended to include a waiver requirement, and employees who sign the waiver and receive plan benefits in exchange will have received adequate consideration. Davis, 2007 U.S. Dist. LEXIS 23193, at *35 (under ERISA, severance benefit plans are considered “welfare benefit plans” and, as a result, employees have no vested interest in them); Sejman v. Warner-Lambert Co., Inc., 889 F.2d 1346, 1348-89 (4th Cir. 1989) (“because, under ERISA, severance benefits are contingent and
unaccrued, an employer may unilaterally amend or eliminate the provisions of a severance plan.

Tobin v. Ravenswood Aluminum Corp., 838 F. Supp. 262, 269 (S.D.W.Va. 1993) (holding that the releases at issue were supported by adequate consideration in the form of an ERISA severance plan, regardless of whether the plan recently had been amended to require employees to sign a waiver in order to receive benefits).

IV. OWBPA Requirements

A. Origins and Purpose of the OWBPA

In order for an employee’s waiver of ADEA rights to be enforceable, it must be “knowing and voluntary.” American Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111, 117 (1st Cir. 1998). Prior to the enactment of the Older Workers Benefit Protection Act (“OWBPA”), courts were split as to whether the enforceability of ADEA releases should be analyzed using a broad “totality of the circumstances” test or whether, like other contracts, these releases were presumptively valid unless obtained through fraud, duress, or mistake. Id. To resolve this split, Congress enacted the OWBPA in 1990, which specified that a waiver of ADEA claims would not be considered “knowing and voluntary” unless it provided affected employees certain minimum information. Id.

B. Coverage

Since ADEA provides age discrimination protections only for employees aged 40 or older, the OWBPA’s requirements apply solely to releases and disclosures provided to these older employees. Additionally, like ADEA, the OWBPA covers only entities employing twenty or more employees for at least twenty weeks a year. 29 U.S.C. § 630.

Failure to comply with the OWBPA invalidates a release only as to ADEA claims. Courts analyze the release of claims under other discrimination statutes, such as Title VII, under a more flexible “totality of the circumstances” standard. See Duval v. Callaway Golf Ball Operations, Inc., 501 F. Supp. 2d 254, 263 (D. Mass. 2007). Thus, although failure to comply with the OWBPA may cast doubt on the general validity of a release, in certain situations courts will deem a release of claims that does not comply with the OWBPA to have been sufficiently “knowing and voluntary” to preserve its validity as to non-ADEA claims. Id.

Since a release for employees younger than 40 must still be “knowing and voluntary” in order to be enforceable, however, courts will generally consider the “totality of the circumstances” test, including:

7 The Massachusetts Commission Against Discrimination (“MCAD”) has held that age discrimination claims brought under M.G.L.c. 151B cannot be barred by releases that do not comply with OWBPA requirements. See McCabe v. Tetley, Inc., 22 Mass. Discrim. L. Rptr. 31 (2000), aff’d 24 Mass. Discrim. L. Rptr. 13 (2002). In contrast, federal courts have ruled that “the OWBPA’s special release provisions do not apply to chapter 151B age discrimination claims” and have held such releases to bar M.G.L.c. 151B claims when they were “knowing and voluntary, as evidenced by the totality of the circumstances.” Duval v. Callaway Golf Ball Operations, Inc., 501 F. Supp. 2d 254, 263-64 (D. Mass. 2007) (explicitly rejecting the holding of McCabe v. Tetley).
whether the release is sufficiently clear in light of the employee’s background;

(2) whether the release was supported by adequate consideration; and

(3) whether the employee was allowed adequate time to consider the release and to consult an attorney.

See *Smart v. Gillette Co. Long-Term Disability Plan*, 70 F.3d 173 (1st Cir. 1995). Thus, in the context of a multi-employee RIF, giving an employee time to consult with an attorney before signing a clearly written release that is supported by adequate consideration will increase the chances that a release will be enforceable for employees under 40 who are not entitled to the specific protections set forth in OWBPA.

C. Release Requirements

The OWBPA requires that a release covering ADEA claims must contain specific language and information in order to be enforceable. Because this required information is specified by statute, courts routinely invalidate releases if they fail to satisfy even one of the requirements enumerated by OWBPA. See *Thomforde v. Int’l Bus. Machs. Corp.*, 406 F.3d 500, 503 (8th Cir. 2005) (“The statutory requirements for waiver of ADEA claims are strict and unqualified; if an employer fails to meet any of the statutory requirements, the waiver is ineffective as a matter of law.”).

Notably, the OWBPA places the burden on the employer to demonstrate that a release it has utilized complies with the OWBPA requirements. 29 U.S.C. § 626(f)(3). Furthermore, an employee may file a suit challenging the release while retaining severance money paid as consideration for the release. See *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998).

1. Clear and Unambiguous Language

To comply with OWBPA, a release must be “written in a manner calculated to be understood by . . . the average individual eligible to participate” in the termination program. 29 U.S.C. § 626(f). In other words, the release should be “drafted in plain language geared to the level of understanding” of the individuals eligible to participate, taking into account such factors as the level of comprehension and education of typical participants. 29 C.F.R. § 1625.22(b)(3). In practice, such considerations will generally “require the limitation or elimination of technical jargon and of long, complex sentences.” *Id.*

For example, courts have held release agreements to be impermissibly ambiguous when they do not clearly explain the difference between a broad release covering ADEA claims and an accompanying covenant not to sue that excluded an employee’s right to challenge the release for failing to comply with OWBPA requirements. See *Syverson v. IBM Corp.*, 461 F.3d 1147 (9th Cir. 2006) (invalidating a release agreement because it “uses a term unfamiliar to lay people, ‘covenant not to sue,’ and does not explain how the release and the covenant not to sue dovetail”); see also Section IV(C)(8).
2. **Specific Reference to ADEA**

The OWBPA requires that releases must “specifically refer[] to rights or claims arising under this Act.” 29 U.S.C. § 626(f). Thus, the “waiver agreement must refer to the Age Discrimination in Employment Act (ADEA)” when specifying the types of potential claims that the employee is releasing by signing the agreement. 29 C.F.R. § 1625.22(b)(6).

3. **No Waiver of Future Claims**

The OWBPA specifies that releases may “not waive rights or claims that may arise after the date the waiver is executed.” 29 U.S.C. § 626(f). Thus, releases should not purport to release claims that may arise in the future, though releases may generally cover claims related to past events or acts of which an employee may not be yet aware.

4. **Additional Consideration**

The OWBPA requires that employees must be provided with consideration for a release “in addition to anything of value to which the individual is already entitled.” 29 U.S.C. § 626(f). Thus, in the RIF context, releases are typically structured as a condition for receiving severance pay to which employees would not otherwise be entitled. The release will not be valid if it is sought in exchange for severance pay that is guaranteed by contract or required by WARN or state plant closing statutes or which will be disbursed regardless of whether employees sign the release. See Section III.

5. **Instruction to Consult an Attorney**

To comply with the OWBPA, releases must advise the employee “in writing to consult with an attorney prior to executing the agreement.” 29 U.S.C. § 626(f). The advice to consult an attorney should be clearly stated in the active present tense, since some courts have invalidated releases that instruct employees only concerning their “right” or “ability” to consult with an attorney or articulate instructions in passive terms. See, e.g., Williams v. Disco Hi-Tec Am., Inc., No. 3:03-CV-2176, 2005 U.S. Dist. LEXIS 20322, at *11 (N.D. Tex. Sept. 15, 2005) (invalidating a release stating that “[e]mployee understands that he should consult with an attorney prior to signing this agreement” because “[t]he language in the Agreement is passive and does not ‘advise’ [the plaintiff] to do anything”).

6. **45-Day Consideration Period**

The OWBPA specifies that releases used in connection with involuntary “employment termination programs” such as layoffs or voluntary “exit incentive programs” such as VERPs must give all employees 40 years old or over 45 days to consider the agreement. 29 U.S.C. § 626(f). This is an expansion of the 21-day consideration period that employees over 40 years old must be given when they are terminated through individualized personnel decisions. Id. Although there is no statutory requirement that employees under 40 years old be provided with similar 45 or 21-day consideration periods, it is generally prudent to provide younger employees with a reasonable time to consider the release and to consult an attorney.
Employees cannot be penalized for utilizing the full 45 days to consider a release before signing, though it is permissible to expedite payments to employees who sign a release before the end of the statutory 45-day period. 29 C.F.R. § 1625.22(e)(4). The 45-day period runs from the date of the employer’s final offer. However, minor changes to the severance program may avoid restarting the consideration period if they are not material or if the parties agree in writing that the changes will not restart the period. Id. Whether a “program” exists is a question of fact, but normally if two or more employees are asked to leave employment for the same reason at or near the same time (e.g., economic downturn) and are offered a standardized benefit package in exchange for a release, then a “program” exists and the company must offer 45 days and must comply with the more stringent disclosure requirements set forth in Section IV(D).

7. Seven Day Revocation Period

The OWBPA requires that employees age 40 or older must be given seven days to revoke a release following its execution. 29 U.S.C. § 626(f). If an employee signs a release prior to the expiration of the 45 day consideration period, the 7 day revocation period runs from the signing date. 29 C.F.R. § 1625.22(e)(6).

8. No Restriction on EEOC Investigations in Covenants not to Sue

Even if the release portion of a severance agreement meets all OWBPA requirements, it may nonetheless be deemed invalid if it is accompanied by an overly broad “Covenant not to Sue” purporting to bar the filing of a complaint with the EEOC. The OWBPA provides that “[n]o waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the” Equal Employment Opportunity Commission (“EEOC”). 29 U.S.C. § 626(f)(4). Based on this statutory language, some courts have invalidated entire release agreements when, in addition to a release of all claims, they contained a broad promise not to bring any claims. See, e.g., Commonwealth v. Bull HN Info. Sys., Inc., 143 F. Supp. 2d 134, 148 (D. Mass. 2001). Thus, any covenant not to sue should not purport to restrict an employee from filing a charge or complaint with the EEOC, including a challenge to the validity of the release itself, and should not restrict the right of the employee to participate in any investigation or proceeding conducted by the EEOC. 29 C.F.R. § 1625.22(i)(2). In such situations, the covenant not to sue should also contain language clearly explaining the difference between anti-suit and release of claims provisions and specifying that the exception of ADEA claims from the covenant not to sue does not affect the waiver of ADEA claims contained in the release. See Thomforde v. IBM Corp., 406 F.3d 500, 504 (8th Cir. 2005). Because of the confusion created by covenants not to sue, employers may wish to consider avoiding them and relying on a release of claims accompanied by a promise not to accept any remedy.

D. Disclosure Requirements

The OWBPA requires that certain disclosures must be made when securing a release of claims in connection with both voluntary “exit incentive” programs and involuntary “employment termination program[s]” covering two or more employees where at least one employee is age 40 or over. 29 C.F.R. §§ 1625.22(f)(1)(iii)(A) and (B).
The OWBPA disclosures must inform affected employees as to:

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

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

29 C.F.R. § 1625.22(f)(1)(i). Providing these disclosures can prove quite complex in practice. The required disclosures are discussed below:

1. Decisional Unit

The “class, unit, or group of individuals covered by” a RIF is referred to in the Department of Labor’s implementing regulations as the “decisional unit.” 29 C.F.R. § 1625.22(f)(1)(iii)(C). A decisional unit is generally that portion of the employer’s organizational structure from which the employer chose the persons who would be selected for the RIF. 29 C.F.R. § 1625.22(f)(3)(i)(B).

The general rule is that a decisional unit is “typically no broader than the facility,” in which the employee receiving the disclosure worked, 29 C.F.R. §1625.22(f)(3)(ii)(B), although it can cross facility lines if individual selection decision-making crosses facility lines. Likewise, a decisional unit may be limited to a portion of the workforce at a facility. 29 C.F.R. §§ 1625.22(f)(3)(ii)(D), (E). Thus, depending on the circumstances, a decisional unit may consist of one or more facilities, divisions, or departments. 29 C.F.R. §§1625.22(f)(3)(iii). Likewise, in certain situations a decisional unit may consist of specific job categories or the employees reporting to a specific corporate executive, even if these employees are spread across multiple geographic locations. 29 C.F.R. §§ 1625.22(f)(3)(iii), (iv), (v). Review of selection decisions by upper level management or human resources does not necessarily widen the decisional unit unless this upper-level review expands the scope of the organizational unit at which selection decisions are made. 29 C.F.R. § 1625.22(f)(3)(vi).

Typically, all employees in a decisional unit must be employed by the same employer. Thus, the employees of multiple subsidiaries of a single corporate parent should generally not be considered part of a single decisional unit unless officials of the corporate parent were involved in the individual termination decisions. See Pagliolo v. Guidant Corp., 483 F. Supp. 2d 847, 859 (D. Minn. 2007).

Likewise, the decisional unit is not necessarily limited to a “selection pool” consisting of the subgroups of individuals who were compared against each other. In other words, if an employer decided that a 10% RIF in the accounting department would come from a “selection pool” of accountants whose performance was in the bottom one third of the division, the relevant “decisional unit” would be the entire accounting department, not simply the accountants in the bottom one third of the division. 29 C.F.R. § 1625.22(f)(4)(v).
In determining the proper decisional unit, it is often helpful to consider the following factors:

(a) What was the lowest organizational level at which reduction targets were expressed with specificity, such as specific headcount reductions or budget cuts;

(b) Who was the highest level individual who substantively participated in making or considering individual layoff recommendations;

(c) If the decisional unit is being defined based on the reporting structure of a senior executive, did the executive consider only those individuals for whom he or she had budgetary responsibility? If so, the decisional unit may properly exclude certain positions that report to the executive but do not fall under the executive’s budgetary purview.

Although not individually dispositive, these factors may assist in determining the portion of the organizational structure from which individual selection decisions were made. When in doubt, it is generally better to err on the side of providing more information, as long as that information is clear and unambiguous. See Burlison v. McDonald’s Corp., 455 F.3d 1242, 1247 (11th Cir. 2006) (holding that decisional unit data must be presented in a scope and form that allows employees and their attorneys to “conduct meaningful statistical analyses . . . to determine whether an employer engaged in age discrimination”). For example, if unsure whether the appropriate decisional unit is company-wide or by business unit, an employer may want to consider providing company-wide data but presented and grouped by business unit so that it is easy for employees to find themselves and understand the information presented.

2. **Eligibility Factors for Layoff**

EEOC regulations indicate that employers can satisfy the eligibility factor disclosure requirements of the OWBPA by disclosing the criteria governing eligibility for severance, rather than for selection for the RIF itself. See 29 C.F.R. § 1625.22(f)(4)(vii)(B) (indicating that a disclosure of eligibility factors would likely be sufficient if it stated “All persons in the Construction Division are eligible for the program. All persons who are being terminated in our November RIF are selected for the program.”). However, some courts have held that employers must disclose the eligibility factors “used to determine who is subject to a termination program,” not simply “the factors used to determine who is eligible for severance pay after termination.” See Commonwealth v. Bull HN Info. Sys., Inc., 143 F. Supp. 2d 134, 147 (D. Mass. 2001). Thus, if performance and job criticality have been assessed in order to select employees for the RIF, then any release may be unenforceable under the OWBPA unless these RIF selection factors are disclosed. Id.

In the face of this conflicting authority, some employers have considered disclosing the factors used to select individuals for a RIF in very general terms. Importantly, “[t]he OWBPA does not require the employer to disclose which factor or factors led to each individual employee’s selection for the termination program.” See Pagliolo v. Guidant Corp., 483 F. Supp. 2d 847, 861 (D. Minn. 2007). Rather, even under the broadest interpretation of OWBPA
requirements, an “employer need only provide a short statement disclosing all eligibility factors considered in general.” Id. Employers should carefully consider the phrasing of even a general statement of RIF selection criteria, since such a disclosure can be used by employees who wish to challenge their selection in the RIF under ADEA or other anti-discrimination statutes if they have a basis for claiming that the articulated selection criteria would not justify the decision to include them in the RIF.

3. **Time Limits**

OWBPA disclosures should clearly denote the time limit for employees to elect participation in any severance pay program. This time period is typically the OWBPA-required 45-day consideration period for employees 40 years old or older. As noted above, employees under 40 may be provided with a shorter consideration period so long as it is sufficient to allow a knowing and voluntary execution of the release.

4. **Job Titles**

Job title disclosures must include information concerning grade levels or other established subcategories within a job category or job title. 29 C.F.R. § 1625.22(f)(4)(iii). For example, if an employer distinguishes the level of engineers using job grade numbers or titles such as “entry,” “intermediate,” or “senior,” the disclosure should list these grade levels. See Pagliolo v. Guidant Corp., 483 F. Supp. 2d 847, 863 (D. Minn. 2007).

5. **Age**

Under the OWBPA, “[i]nformation regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program.” 29 C.F.R. § 1625.22(f)(4)(ii). Thus, employers are required to disclose the ages of all employees in the decisional unit, not simply those employees terminated in the RIF.

The use of one-year age bands is permissible, so long as the disclosure also denotes the different job titles of employees who are the same age. However, “[t]he use of age bands broader than one year (such as ‘age 20-30’)” does not satisfy OWBPA requirements. 29 C.F.R. § 1625.22(f)(4)(ii). Whether listing ages individually or in one year bands by job title, it is generally best practice to list these ages in order from youngest to oldest, so that they can be easily analyzed by affected employees. 29 C.F.R. § 1625.22(f)(4)(vii)(D).

6. **Multi-Stage RIFs**

When a RIF in a single decisional unit takes place in successive increments over time, the information supplied with regard to terminations must be cumulative. In other words, the disclosures provided to later terminees must list the ages and job titles of all persons in the decisional unit at the beginning of the RIF, and must denote all individuals terminated through that date, including in earlier phases of the RIF. 29 C.F.R. § 1625.22(f)(4)(vi). Notably, in a multi-stage RIF there is no need to supplement the information given to early-stage terminees, so long as that information was accurate at the time provided. 29 C.F.R. § 1625.22(f)(4)(vi). The cumulative reporting requirement is avoided if subsequent RIF phases take place in different
decisional units or if the decisional unit has changed (aside from layoffs or other departures) since earlier RIF phases.

7. **Presentation of the Disclosure**

The purpose of the OWBPA’s disclosure requirements is to provide employees with enough information regarding the program coverage to allow them to make an informed choice whether or not to sign a release agreement. 29 C.F.R. § 1625.22(f)(1)(iv). Thus, the required disclosures must be presented “in a manner calculated to be understood by the average individual eligible to participate.” 29 U.S.C. § 626(H). The disclosures should generally be provided in writing to each person who is asked to sign a release agreement in connection with the job action. 29 C.F.R. § 1625.22(f)(2).

As a general matter, courts are skeptical of disclosures that would not allow most employees to determine whether they have a potentially valid statistical age discrimination claim. See Commonwealth v. Bull HN Info. Sys., Inc., 143 F. Supp. 2d 134, 147 (D. Mass. 2001) (finding that age disclosures in the form of “abstruse spreadsheets” did not comply with the OWBPA since an affected employee would only be able to “discover a valid ADEA claim hidden in these columns of numbers . . . [with] the help of a statistician”). Thus, if employers wish to ensure the enforceability of ADEA releases, it should take measures to assure that disclosures are more easily understood. For example, if the decisional unit is large, the employer should consider dividing the information into organizational subgroups or facilities within the disclosure in order to reduce the risk that a lengthy list containing data on hundreds of indistinguishable employees could be deemed to be overly confusing. On the other hand, employers should carefully consider the pros and cons of providing additional information beyond that required by statute, since such information could be challenged as making the disclosure overly complex.

V. **Challenges to Layoff Decisions**

The decision to select individuals for layoff may be challenged in many ways. Below is a discussion of the most likely claims that an employee could file. See also Section I(E)(1) for a discussion of statistical disparities.

A. **Disparate Treatment**

Employees may claim that they were laid off because they are a member of a protected class, such as race, national origin, sex, religion, handicap, or age. Such claims may arise under Title VII, the Americans with Disabilities Act (“ADA”), the ADEA, or similar state laws, such as Mass. Gen. Laws c. 151B.

1. **Individual Claims**

To establish an individual prima facie case of disparate treatment, an employee must demonstrate that he or she was a member of a protected class, was performing his or her job at an acceptable level, was terminated, and other employees in the same position not in the protected class were retained or the employer did not treat the protected category neutrally. Lewis v. City of Boston, 321 F.3d 207, 214 (1st Cir. 2003); Armbruster v. Unisys, 32 F.3d 768 (3rd Cir. 1994);
see also Sullivan v. Liberty Mutual Insur. Co., 444 Mass. 34, 45 (2005) (holding that to establish a prima facie case, plaintiff must produce “some evidence that her layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination”). See also Vega v. Kodak Caribbean, Ltd., 3 F.3d 476, 479 (1st Cir. 1993) (finding that lack of neutrality “may be manifested either by a facially discriminatory policy” or by a facially neutral policy that “has the effect of discriminating” against individuals in the protected group).

An employee will only be viewed as terminated pursuant to a reduction in force if the employee’s position is eliminated and the employee is not replaced. See Pages-Cahue v. Iberia Lineas Aereas de Espana, 82 F.3d 533, 539 (1st Cir. 1996) (internal quotations omitted) ("[A] discharged employee is not replaced when another employee is assigned to perform the plaintiff’s duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. Rather, a person is replaced only when another employee is hired or reassigned to perform the plaintiff’s duties.").

Plaintiffs can use statistics in individual disparate treatment cases to support their prima facie case. See Sullivan v. Liberty Mutual Insur. Co., 444 Mass. 34, 46 n.16 (2005). Although statistics on their own are rarely dispositive in such cases, plaintiffs can combine statistical analysis with other evidence in an attempt to show that an employer’s asserted reason for termination is pretextual. See Rummery v. Illinois Bell Tel. Co., 250 F.3d 553, 559 (7th Cir. 2001) (“[W]hile statistics may be used to demonstrate that the employer’s proffered reason for discharge is pretextual, standing alone they are not likely to establish a case of individual disparate treatment.").

If the employee establishes a prima facie case of discrimination, the employer must provide a legitimate, non-discriminatory reason for the termination. The employee may then try to demonstrate that this articulated reason was “mere pretext.” See McDonnell Douglas Corp v. Green, 441 U.S. 792; Wheeldon College v. Massachusetts Comm’n Against Discrim., 371 Mass. 131 (1976). The employee must show, through direct or indirect evidence, that the employer’s articulated reason was false and that discrimination was the real reason for the employment action. Discrimination may be inferred if the fact-finder disbelieves the employer’s proffered rationale. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 149 (2000) (“[A] prima facie case and sufficient evidence to reject the employer’s explanation may permit a finding of liability…”). In addition, although an employee must demonstrate proof of discriminatory motive to prevail on a disparate treatment claim, in some circumstances such a motive may be inferred from the mere fact of differences in treatment. School Committee of Braintree v. Massachusetts Comm’n Against Discrim., 377 Mass. 424 (1979).

2. Class Claims

In addition to individual disparate treatment claims, disparate treatment “pattern or practice” claims may be brought on behalf of a class of employees. To succeed on such a claim, the employees must prove that “discrimination was [the company’s] standard operating procedure – the regular rather than the usual practice.” Int’l Bhd. of Teamsters v. U.S., 431 U.S. 324, 335 (1977). In essence, “a company engages in a pattern or practice of discrimination when it systematically engages in intentional discrimination against a protected group, or in other words, when it maintains a regular, corporate policy of purposeful discrimination in some aspect

To meet this burden, plaintiffs must point to a formal or informal policy or a structure of decision-making that led to the disparate treatment of a protected group. In extreme cases, it is possible to base such a case solely on strong statistical evidence that a particular policy or practice adversely affected the group. *Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 307-308 (1977). More frequently, however, the plaintiffs must also provide some other evidence, such as policies or comments indicative of discrimination. See, e.g., *In re Western Dist. Xerox Litig.*, 850 F.Supp. 1079, 1084 (W.D.N.Y. 1994); *Flavel v. Svedala Indus., Inc.*, 868 F. Supp. 1422 (E.D. Wis. 1994) (finding prima facie case of pattern or practice in RIF context sufficient to withstand summary judgment).

If a pattern or practice is found, this creates a presumption that each individual plaintiff who was adversely impacted by the pattern or practice was discriminated against. See *Teamsters*, 431 U.S. at 362. At that point, the employer must overcome that presumption of discrimination by proving a legitimate, non-discriminatory reason for the termination. The employee may try to demonstrate that the articulated reasons are mere pretext. Unlike the *McDonnell-Douglas* burden-shifting framework in individual disparate treatment cases described above, here the employer has not only the burden of producing evidence of a legitimate, non-discriminatory reason but also the burden of proving that the decision was based on legitimate, non-discriminatory reasons.

B. **Disparate Impact**

Disparate impact claims are based on the notion that some employment decisions may be “fair in form but discriminatory in operation.” *Griggs v. Duke Power*, 401 U.S. 424, 431 (1971). Such claims may be brought by individual employees or as a class action. (Under the ADEA, such group claims are called “collective actions.”) See Section I(E)(1) for a discussion of the use of statistics in the layoff context.

Employees can establish a prima facie case of disparate impact if they can show that a specific facially neutral policy or practice had a statistically significant negative impact on employees in a particular protected group. See, e.g., *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005) (employee must “isolate[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities”). If the employees establish a prima facie case of disparate impact, the employer can rebut that case by demonstrating that the decision-making criteria were “job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i). In the case of an age-related claim under the ADEA, the employer only needs to show that the decision was reasonable, not that it was a business necessity. It is the employer’s burden to demonstrate business necessity, or in the ADEA context, reasonableness. *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Meacham v. Knolls Atomic Power Lab*, ___U.S. __, 128 S. Ct. 2395 (2008).
C. Liquidated Damages

Successful parties in an age discrimination claim may be eligible for liquidated damages if they can demonstrate that the company’s conduct was “willful.” See 29 U.S.C. § 626(b); Mass. Gen. Laws. c. 151B § 9. A finding of such willfulness can lead to the award of double or triple damages. The company may defend against such a claim by demonstrating that it executed the reduction in force in “good faith.” Because demonstrating good faith may require that the company assert it relied on the advice of counsel to ensure that there was no discrimination, asserting a good faith defense may entail an implicit or explicit waiver of the attorney-client privilege.

1. Waiver of Attorney-Client Privilege

Before waiving the attorney-client privilege, a company should be aware of the potential risks. Although the company may argue that this should be a limited subject matter waiver restricted to the question of whether the company executed the reduction in force in good faith, there is a risk that a court will construe the “subject matter” of the waiver to be everything related to the RIF. Counsel should be aware of this issue in generating RIF-related documents.

The general rule is that a voluntary disclosure of one protected document or communication waives the privilege for all documents or communications on the same subject. See, e.g., In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989) (finding that disclosure of one of six documents related to same subject matter waives privilege to all); Harding v. Dana Transp., 914 F. Supp. 1084 (D.N.J. 1996) (finding that reliance on report detailing investigation into plaintiffs’ discrimination claims resulted in subject matter waiver); Teachers Ins. & Annuity Ass’n v. Shamrock Broad. Co., 521 F. Supp. 638, 641 (S.D.N.Y. 1981) (“[A] party cannot, by selective invocation of the privilege, disclose documents or give testimony favorable to that party while failing to disclose cognate material unfavorable to that party.”). A party cannot use selected privileged materials to its advantage in litigation while seeking to shield related, and possibly unfavorable, materials behind the privilege.

Ultimately, whether to waive the privilege depends on a careful evaluation of all privileged documents to assess the potential benefits of revealing documents and the potential downside if a court interprets the waiver more broadly than the company intends.

D. Other Claims

Employees may also challenge layoff decisions in all of the ways they can challenge a stand-alone termination, including but not limited to breach of contract claims, claims under the Employee Retirement Income Security Act (“ERISA”), public policy wrongful discharge claims, whistle-blowing retaliation claims, or claims for detrimental reliance.
Goodwin Procter's Labor & Employment Practice involves representation of management in all areas of labor and employment law. Our attorneys counsel local, regional and national companies across a broad spectrum of industries, including high technology, manufacturing, pharmaceuticals, transportation, printing, public utilities, banking, financial services, retailing, health care, and construction.

We provide practical advice to employers with respect to all aspects of the employment relationship, ranging from hiring and disciplinary practices, compensation practices, workplace violence, privacy concerns, issues arising under the Family and Medical Leave Act, loyalty issues, and protection of employer good will and proprietary information via restrictions on post-employment competition. We combine in-depth legal knowledge with focused, practical experience to help managers make real-world judgments while minimizing potential exposure.

Our attorneys have extensive employment litigation experience involving all significant employment law issues, including reasonable accommodation of disabilities; sexual harassment; discrimination claims arising out of reductions in force; individual disparate treatment claims; wrongful discharge/public policy claims; employment contract and employee benefits claims; wage and hour disputes; and enforcement of noncompetition obligations. Our experience includes defending class and collective actions as well as cases brought by individual plaintiffs.

Our practice includes representation of management before the National Labor Relations Board in union organizing and unfair labor practice cases. We represent employers in collective bargaining negotiations with unions and in labor arbitration proceedings. We also assist clients in maintaining or reinstating a union-free atmosphere.

We have extensive experience in Department of Labor investigations and litigation under the Fair Labor Standards Act, the Occupational Safety and Health Act, and Executive Order 11246. We help clients develop affirmative action programs and represent them during DOL audits of those programs.

We are committed to providing aggressive and cost-effective representation. Our attorneys make early assessments of potential liability, work closely with management to weigh the principles at stake in each case against the cost of defending them, and carefully consider the feasibility of alternative dispute resolution. In litigating cases, we emphasize thoughtful preparation of legal and factual defenses, with an eye toward summary judgment.
Areas of Practice
Jim Nagle, a partner in and chair of the firm’s Labor & Employment Practice, focuses his practice on defending corporations against employee claims. Mr. Nagle practices in both state and federal courts, as well as before a variety of administrative agencies. He is experienced in litigating complex age, sex, race and disability discrimination claims, including class actions and jury cases, as well as in defending whistle-blower, civil rights, employee privacy and drug-testing cases. He also has substantial experience negotiating and litigating issues related to the termination of highly compensated senior executives. Mr. Nagle also has substantial appellate experience dealing with complex and novel employment law claims.

Work for Clients
Mr. Nagle represents a broad spectrum of regional and national clients in diverse fields, including high technology, financial services, manufacturing, retail and higher education. He regularly counsels clients on strategies for avoiding employment litigation and maintaining positive, direct relations with employees. Mr. Nagle also has experience advising clients with affirmative action, collective bargaining, labor arbitration, OSHA and wage and hour issues. His recent engagements include:

- Defending an age discrimination collective action brought by more than 100 plaintiffs arising out of a reduction-in-force and alleging disparate impact and a pattern or practice of discrimination.
- Prevailing before the First Circuit in a case of first impression that limited the extra-territorial application of the whistle-blowing protections of the Sarbanes-Oxley Act.
- Guiding the independent Board members of a publicly-traded company in responding to sexual harassment allegations directed against the Company’s Chief Executive Officer.
- Achieving a substantial favorable jury verdict on behalf of a departing CEO and his new employer charged with misappropriating confidential information from his prior employer.

Professional Activities
Mr. Nagle served as the management chair of the Labor and Employment Law Section of the Boston Bar Association from 1992-1994. He serves on the Individual Rights and
Responsibilities Committee of the American Bar Association’s Labor and Employment Law Section. Mr. Nagle has been selected for inclusion in Chambers USA: America’s Leading Lawyers for Business and The Best Lawyers in America.

Publications/Presentations
Mr. Nagle served as an Editor of the Georgetown Law Journal at Georgetown University Law Center. He is a contributing editor to the fourth edition of the American Bar Association’s Covenants Not to Compete: A State-by-State Survey.

Bar and Court Admissions
Mr. Nagle is admitted to practice in Massachusetts, and before the U.S. District Court of Massachusetts and the U.S. Court of Appeals for the First Circuit.

Education
J.D., Georgetown University Law Center, 1980 (magna cum laude)
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Areas of Practice
Heidi Goldstein Shepherd, a partner in the firm’s Labor & Employment Practice, has extensive experience representing the firm’s management and institutional clients in all aspects of the employment relationship. Ms. Shepherd has successfully represented clients in a variety of labor and employment litigation matters, including the defense of sexual harassment, discrimination, employee whistleblower and breach of employment contract actions arising under federal and state laws. She also counsels clients on a number of employment-related issues that arise in their day-to-day business activities including employee discipline and termination, compliance with the various federal and state statutes and regulations governing the employment relationship and the preparation of employment contracts and employee non-compete agreements.

Professional Activities
Ms. Shepherd is a member of the Boston and Massachusetts Bar Associations. She was elected to the Order of the Coif while attending Boston College Law School.

Publications/Presentations
Ms. Shepherd recently chaired a seminar focusing on the defense of employee whistleblower actions for the Massachusetts Bar Association. While attending law school, she was the Executive Editor of the Boston College Law Review.

Bar and Court Admissions
Ms. Shepherd is admitted to practice in Massachusetts, and before the U.S. District Court of Massachusetts, U.S. Supreme Court and the U.S. Court of Appeals for the First and Sixth Circuits.

Education
J.D., Boston College Law School, 1994 (magna cum laude)
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Areas of Practice
Leslie Blickenstaff is a senior counsel in the firm’s Labor & Employment Practice, representing clients in all aspects of labor and employment relations. Ms. Blickenstaff’s practice involves the defense of wrongful termination and employment discrimination claims before state and federal courts and administrative agencies.

Work for Clients
Ms. Blickenstaff has extensive experience with complex employment litigation, including the defense of an age discrimination collective action arising from a reduction-in-force and restrictive covenant and fiduciary duty cases involving claims of employee raiding and misappropriation of entire practices or businesses. She has served as co-counsel in successful jury trials. In addition to her extensive employment litigation experience, Ms. Blickenstaff regularly counsels corporate clients on complying with employment laws and avoiding litigation risks.

Professional Activities
Ms. Blickenstaff is a member of the Boston, Massachusetts and American Bar Associations. She was recognized as a Massachusetts Super Lawyer “Rising Star” by Law & Politics and Boston magazine in 2007 and 2008.

Publications/Presentations
Ms. Blickenstaff was an Editor of the Minnesota Law Review at the University of Minnesota Law School.

Bar and Court Admissions
Ms. Blickenstaff is admitted to practice in Massachusetts, and before the U.S. District Court of Massachusetts.

Education
J.D., University of Minnesota Law School, 1997 (magna cum laude, Order of the Coif)
B.A., Bowdoin College, 1994 (summa cum laude, Phi Beta Kappa)
Bill Benoit, a partner in the firm’s Labor & Employment Practice, has represented management in all types of labor and employee relations disputes since 1975. He has extensive employment litigation and alternative dispute resolution experience. Mr. Benoit has successfully defended companies across a broad spectrum of industries in suits involving a wide variety of wrongful discharge and employment discrimination issues, including whistleblowing, disparate treatment, sexual and racial harassment, equal pay, reasonable accommodation of disabilities, and age discrimination claims arising out of reductions in force. He has considerable experience in non-competition litigation.

Mr. Benoit has substantial experience in handling traditional labor law matters involving collective bargaining, arbitration, unfair labor practice cases before the National Labor Relations Board and court injunctions to restrain unlawful picketing activity. He counsels employers on a daily basis regarding issues such as policy development, disciplinary action, workplace privacy, obligations under the Family & Medical Leave Act, workplace safety, affirmative action obligations, and wage/hour questions.

Mr. Benoit is a member of the Labor & Employment Law Sections of the Massachusetts and American Bar Associations. He has been selected for inclusion in *Chambers USA: America’s Leading Lawyers for Business* and *The Best Lawyers in America*. 


Mr. Benoit has presented several employee relations training programs to clients’ managers, executives and human resources professionals.
Bar and Court Admissions
Mr. Benoit is admitted to practice in Massachusetts, and before the United States District Court of Massachusetts, the U.S. District Court of Vermont, the U.S. Court of Appeals for the First Circuit, and the U.S. Court of Appeals for the Second Circuit.

Education
J.D., University of Michigan Law School, 1973 (cum laude; Associate Editor, Michigan Law Review)
B.A., University of Notre Dame, 1970 (cum laude)
Areas of Practice
Jennifer Fay, a partner in the firm’s Labor & Employment Practice, works on a variety of labor and employment issues, including discrimination claims before administrative agencies, federal and state employment matters, employment contracts, separation agreements, arbitration proceedings, development and review of human resources policies and counseling on employment related issues, including non compete matters, leaves of absence, OSHA compliance and wage and hour matters.

Work for Clients
Ms. Fay has an extensive background in the employment law field. She has been involved in a wide variety of employment related issues as a counselor, litigator and as a trainer. Ms. Fay has worked with large publicly traded organizations as well as small businesses and across industry lines. Her experience includes conducting detailed internal investigations, handling complex employment litigation, assisting companies with the development and implementation of personnel policies, contract negotiations and providing legal advice on day to day human resources matters.

Over the years, Ms. Fay has developed special expertise in the areas of sexual and other types of discriminatory harassment, reductions-in-force, restrictive covenants, employment contracts and workplace violence.

Professional Activities
Ms. Fay is a graduate of the Massachusetts Commission Against Discrimination’s Train the Trainer Certification Program and is on the MCAD’s list of recommended trainers. She is a member of the Boston, Massachusetts and American Bar Associations.

Publications/Presentations
Ms. Fay’s most recent article is “Enforcement of Non-Competition Agreements: Developments in Massachusetts” – co-authored with Wilfred Benoit – which appeared in the Autumn 2004 edition of Employee Relations Law Journal.
Ms. Fay has presented numerous client seminars and has taught continuing legal education courses for attorneys on employment law topics. She served as Editor-in-Chief of the *Suffolk University Law Review*.

**Bar and Court Admissions**
Ms. Fay is admitted to practice in Massachusetts.

**Education**
J.D., Suffolk University Law School, 1993 (*magna cum laude*)
B.A., Boston College, 1989 (*cum laude*)

Ms. Fay was the recipient of the Law Faculty’s Outstanding Student Award at Suffolk University Law School.
Areas of Practice
Steve Feldstein is a partner in the firm’s Litigation Department and a member of the Labor & Employment Practice. He focuses his practice on labor and employment law. Mr. Feldstein joined Goodwin Procter in 2008.

Work for Clients
Mr. Feldstein has represented and counseled companies in diverse areas of labor and employment law. His practice includes advising management in key employee relations, trade secrets protection, avoiding and litigating wrongful termination and employment discrimination claims, employee handbooks and policies, workforce reductions, NLRB proceedings, union avoidance, arbitration and collective bargaining, OSHA compliance and wage and hour disputes. Mr. Feldstein also counsels companies on the employment-related ramifications of corporate mergers and acquisitions.

Publications/Presentations
Mr. Feldstein has lectured on labor and employment law at Stanford University, St. Mary’s College, College of Marin and various seminars for attorneys, human resources professionals and others. He is the co-author of the chapters “Settlement,” in Wrongful Employment Termination Practice (CEB, 1987), and “Handling the Wrongful Discharge Action,” in Personal Injury Handbook (James Publishing, 1991).

Professional Experience
Prior to joining Goodwin Procter, Mr. Feldstein was a partner in the Silicon Valley office of Heller Ehrman, where he was co-chair of its labor and employment practice nationwide.

Bar and Court Admissions
Mr. Feldstein is admitted to practice in California.

Education
J.D., University of California, Berkeley, Boalt Hall School of Law, 1973
B.A., Occidental College, 1970 (departmental honors)
Areas of Practice
Rob Hale, a partner in the firm’s Labor & Employment Practice, represents employers across a broad spectrum of employment matters.

Work for Clients
Mr. Hale’s practice involves representation of clients in employment litigation, including noncompetition, discrimination, wrongful discharge, FLSA and ERISA litigation. He has obtained successful results for employers at all stages of litigation, including in preliminary injunction proceedings, at summary judgment, at trial and on appeal. Mr. Hale is experienced in successfully representing employers before administrative agencies and in labor arbitrations. His practice also includes counseling in numerous areas of labor and employment law, including disability discrimination, sexual harassment and other discrimination matters; noncompetition agreement and other restrictive covenants; downsizing; employment agreements; wage and hour compliance; collective bargaining; and personnel policy development and administration. In addition, Mr. Hale is experienced in providing training for managers, supervisors and human resources professionals.

Professional Activities
Mr. Hale serves on the Federal Labor Standards Legislation Committee of the American Bar Association. He is a former chair of the ABA’s subcommittee on the Family and Medical Leave Act, the ABA’s subcommittee on the WARN Act and the Boston Bar Association’s Employee Benefits/ERISA Committee.

In 2007, Mr. Hale was elected to be a Fellow of the College of Labor and Employment Lawyers. He was recognized by Super Lawyers magazine as a New England Super Lawyer, and was selected for inclusion in Chambers USA: America’s Leading Lawyers for Business and The Best Lawyers in America.

Publications/Presentations
Mr. Hale has spoken at a number of seminars, including those presented by the American, Boston and Massachusetts Bar Associations and various professional and trade groups.
Mr. Hale is co-editor-in-chief of the comprehensive and leading treatise entitled *The Family and Medical Leave Act*, and a chapter editor of *The Fair Labor Standards Act* – both published jointly by the American Bar Association and the Bureau of National Affairs. In addition, Mr. Hale is the author of *Union Affiliation: Examination of the Governing NLRA Standards*, 1983 Det. C.L. Rev. 709.

**Professional Experience**
Prior to joining Goodwin Procter, Mr. Hale clerked for Justice Armstrong of the Massachusetts Appeals Court.

**Bar and Court Admissions**
Mr. Hale is admitted to practice in Massachusetts and the District of Columbia, and before the U.S. District Court of Massachusetts.

**Education**
J.D., Boston University, 1983 (*magna cum laude*)
B.S., Cornell University, 1980
Areas of Practice
Don Munro is a litigator with experience in administrative law, antitrust, fair housing, labor and employment, and complex commercial matters. Mr. Munro has particular expertise in matters arising under the Railway Labor Act, including collective bargaining disputes, union representation issues and strikes by unionized employees. He also has experience in public international law and serves as the vice-chair of the American Bar Association’s International Criminal Law Committee.

Publications/Presentations

Mr. Munro also teaches employment law as an adjunct professor at The George Washington University School of Law.

Professional Experience
Mr. Munro was a partner at Shea & Gardner prior to its combination with Goodwin Procter in 2004. After law school, Mr. Munro clerked for the Honorable J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit.

Bar and Court Admissions
Mr. Munro is admitted to the bar in Maryland and the District of Columbia, as well as to the bar of the U.S. Supreme Court and a number of federal district and circuit courts.

Education
J.D., University of Virginia, 1994 (Order of the Coif)
B.A., International Relations, Johns Hopkins University, 1990 (Phi Beta Kappa)
Areas of Practice
Joe Piacquad, a partner in the firm’s Labor & Employment Practice, concentrates on representing and counseling corporations and individuals in connection with employment and labor relations issues arising in corporate transactions. Mr. Piacquad also negotiates and advises employers and executives regarding employment contracts, severance arrangements and restrictive covenant agreements. He represents and advises employers and individuals in connection with work-based visas and immigration matters. Mr. Piacquad also represents employers in labor relations, employee benefits and employment matters.

Work for Clients
Mr. Piacquad’s practice includes counseling and representing individuals and employers in connection with labor and employment matters that arise in transactions, structuring employment relationships, including employment contracts, severance and separation agreements, and restrictive covenant agreements. He provides employment-based visa and immigration representation and advice to individuals and employers. Mr. Piacquad also represents and counsels a variety of employers in connection with employment discrimination and wrongful termination claims, issues under the National Labor Relations Act, employee benefits issues under the Employee Retirement Income Security Act, compensation issues arising under the Fair Labor Standards Act, development of personnel policies and procedures, and other employment-related issues. He assists and advises clients in structuring operations and transactions to permit maximum employment and labor law flexibility.

Mr. Piacquad has experience before federal and state courts and administrative agencies, including the United States Citizenship and Immigration Services, National Labor Relations Board, the Equal Employment Opportunity Commission, the Department of Labor, the Massachusetts Commission Against Discrimination and the Ohio Civil Rights Commission.

Professional Activities
Mr. Piacquad is a member of the Boston, Ohio, Massachusetts and American Bar Associations.

Publications/Presentations
Mr. Piacquad is a contributing editor to the fourth edition of the American Bar Association’s Covensants Not to Compete: A State-by-State Survey.
Bar and Court Admissions
Mr. Piacquad is admitted to practice in the State of Ohio and the Commonwealth of Massachusetts.

Education
J.D., Harvard Law School, 1990 (cum laude)
B.A., Colgate University, 1984 (magna cum laude)
Areas of Practice

Eric Roth is a senior counsel in the firm’s Labor & Employment Practice. Mr. Roth represents clients in all aspects of labor and employment relations. His practice involves counseling corporate clients on complying with the full array of laws affecting the workplace and avoiding litigation, as well as representing employers in employment-related litigation, arbitration and administrative proceedings. Mr. Roth has represented major corporations in, among others, the financial services, banking, insurance, retail, manufacturing, publishing, media, legal, education, entertainment, technology and health care industries. He joined Goodwin Procter in 2003.

Work for Clients

Mr. Roth handles all types of employment litigations and disputes, including single and multiple plaintiff cases, class actions and collective actions before federal and state courts, administrative agencies, and various arbitration and mediation forums across the country. His litigation practice includes claims of sexual and other forms of harassment, employment discrimination, breach of contract, executive compensation and bonus claims, discipline and discharge disputes, and tort claims arising in the employment context. Mr. Roth also has a wealth of experience both prosecuting and defending non-competition, non-solicitation, trade secrets and other restrictive covenants matters.

In addition to employment litigation, Mr. Roth has an active counseling practice, and regularly provides advice and guidance to employers on a host of employment-related matters and issues, including reductions in force, restructuring, terminations, hiring, discipline, internal investigations, employment agreements, non-compete and other restrictive covenant agreements, leave and accommodation issues, and employment policies and manuals. He also provides advice and counsel to employers on avoiding or minimizing the risk of litigation and on achieving their employee relations objectives through such techniques as proactive human resources policies and procedures, training and alternative dispute resolution. Mr. Roth has been regularly involved in devising and conducting training programs for clients’ managers and staff in connection with discrimination and harassment prevention, class action claims avoidance and defense strategies, and other employment law developments and issues. He also regularly provides employment and labor advice and analysis in connection with various forms of corporate transactions, and negotiates and drafts employment contracts and related agreements for high-level executives, officers and corporate management.
Professional Activities
Mr. Roth is a member of the American Bar Association, and a member of the ABA’s Labor and Employment Law Section.

Publications/Presentations
Mr. Roth has authored and contributed to a number of articles for HR Advisor: Legal & Practical Guidance magazine on a host of employment law topics including the Age Discrimination in Employment Act and the Older Workers Benefit Protection Act. While attending law school, he was an Editor of the Cornell Journal of Law and Public Policy, and a founding member and Editor of the Cornell Reporter.

Professional Experience
Prior to joining Goodwin Procter, Mr. Roth was an associate in the Labor & Employment Law department of Proskauer Rose LLP in New York from 1995 to 2003.

Bar and Court Admissions
Mr. Roth is admitted to practice in New York and before the U.S. District Courts for the Southern and Eastern Districts of New York.

Education
J.D., Cornell Law School, 1995 (cum laude)
A.B., Princeton University, 1992
Brad Smith, a partner in the firm’s Labor & Employment Practice, primarily represents management and institutional clients. His practice includes employment discrimination proceedings before state and federal courts and agencies, wrongful discharge litigation, proceedings before the National Labor Relations Board, labor arbitrations and actions arising under the Occupational Safety and Health Act.

He counsels clients on employment-related issues such as employee discipline and termination, development of affirmative action programs and personnel policies, compliance with wage-hour regulations, development and enforcement of employee noncompetition and confidentiality agreements, and compliance with miscellaneous state and federal employment laws and regulations.

Mr. Smith represents a variety of local, regional, and national clients in several industries, including high technology, utilities, manufacturing, financial services and retail.

Professional Activities
Mr. Smith is a member of the Boston and Massachusetts Bar Associations and serves on the Occupational Safety and Health Committee of the American Bar Association. He has been selected for inclusion in Chambers USA: America’s Leading Lawyers for Business.

Bar and Court Admissions
Mr. Smith is admitted to the bars of Massachusetts, the U.S. District Court for the District of Massachusetts and the First Circuit Court of Appeals.

Education
J.D., Boston University, 1987 (cum laude)
B.A., University of Pennsylvania, 1980
ALBERT J. SOLECKI, JR.
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Areas of Practice
Al Solecki is the chair of Goodwin Procter’s New York office, a member of the firm’s Executive Committee and a partner in the firm’s Labor & Employment Practice. He counsels businesses on how to avoid legal claims by employees and represents employers when they are the target of employment-related litigation or administrative proceedings.

Work for Clients
Mr. Solecki represents employers in all phases of labor and employment-related litigation. He appears regularly before federal and state courts and arbitration tribunals throughout the United States and has successfully defended employers in the consulting, construction, entertainment, financial services, manufacturing, oil and gas, pharmaceutical, publishing, sports, transportation and technology industries. Mr. Solecki also has extensive experience representing employers and senior-level executives as lead trial counsel in restrictive covenant litigations involving allegations of employee raiding, theft of trade secrets and breach of non-competition and non-solicitation agreements.

Mr. Solecki also counsels and advises employers on compliance with the ever increasingly complex web of federal, state, and local labor and employment laws and regulations. This counseling and advice ranges from drafting and reviewing general employment policies, employment agreements and employee handbooks to assisting with specific employee terminations and other employment-related decisions; from designing and implementing management seminars and training on new laws, regulations and court decisions to giving advice on difficult personnel actions such as plant closings, mass layoffs and the reduction or elimination of employee benefit programs.

Mr. Solecki has extensive experience in counseling employers on how to minimize legal exposure in the context of a reduction in force and has developed employee exit incentive programs for dozens of employers who have implemented reductions in force. Moreover, he regularly advises purchasers, sellers, and lenders on labor and employment law aspects of business mergers, acquisitions and restructurings.

Professional Activities
Mr. Solecki was selected for inclusion in the 2006 and 2007 editions of New York Super Lawyers. He is a graduate of the National Institute of Trial Advocacy’s Trial Training.
Program and is an active member of the American Bar Association. Mr. Solecki is a member of the ABA’s Section of Labor and Employment Law as well as its Section of Litigation, and he serves on the ABA’s Trial Practice Committee, its Committee on Employment and Labor Relations Law, and its Committee on Pretrial Practice and Discovery. In addition, he is a member of the New York Management Attorneys’ Conference (an honorary society of management-side labor and employment law attorneys who have practiced exclusively in the labor and employment law field for more than ten years and who have distinguished themselves in this field).

Publications/Presentations

Professional Experience
Prior to joining Goodwin Procter, Mr. Solecki was a member of the Labor and Employment Law Department at O’Melveny & Myers LLP.

Bar and Court Admissions
Mr. Solecki is admitted to practice in New York.

Education
J.D., Villanova University School of Law, 1990
B.S., Georgetown University, 1985

While attending law school, Mr. Solecki was Managing Editor of the *Villanova Environmental Law Journal*, a member of the Villanova Moot Court Board and the recipient of the Bureau of National Affairs Award for Scholastic Performance.