Risk Management
Guidance for Employers Conducting a
Reduction in Force

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I. INTRODUCTION

The Bureau of Labor Statistics reports that mass layoff events in 2001 exceeded those in 2000 by 45%. And the trend continues; preliminary figures indicate that more than 300,000 people lost their jobs as the result of a mass layoff during the first quarter of 2002. Despite reports that an economic recovery is in progress, numerous corporate accounting scandals and a shift in market forces have driven corporate behemoths such as IBM and WorldCom to sever thousands of employees who, in turn, compete for fewer jobs.

These current economic realities make it likely that even the most stable and conservative employer may need to consider a workforce reduction in order to survive. Employers considering a reduction in force (RIF) face numerous challenges, the most significant of which is ensuring that their post-RIF labor cost savings are not offset by the costs associated with claims brought by displaced workers. This paper will discuss a number of potential legal risks associated with RIFs and ways in which downsizing employers can manage around those risks. As is the case with nearly all litigation, while it may be impossible to prevent the claims from being filed, it is possible to position oneself to be able to defend against the charges when they come.
II. Common Risks Arising Out of RIFs

While most U.S. jurisdictions follow the “employment at will” doctrine, this doctrine may provide little protection when a poorly planned RIF is challenged. In general, while the employment at will doctrine allows an employer to take adverse employment action against an employee for any reason or no reason at all, a RIF may nonetheless result in liability for an employer if its selection process is found to violate federal, state or local laws, regulations or public policy. Before even contemplating a RIF, it is important for employers to appreciate the common legal theories used by outplaced employees challenging their terminations.

A. Anti-Discrimination Laws


Under Title VII, courts consistently have held that any form of discrimination based on race, gender, alienage/national origin or religious preference is prohibited, even if the discrimination is against a member of a majority group and is to the benefit of a protected class member (so-called reverse discrimination claims). See, e.g., Hopp v. Pittsburgh, 194 F.3d 434 (3d Cir. 1999). Although the case law is clear on the fact that persons under the age of 40 are not

Outplaced employees may bring a discrimination claim under one of two theories: disparate impact or disparate treatment. Under a disparate impact theory, a downsizing employer may be held liable under anti-discrimination laws for using neutral selection criteria that results in a disproportionate number of employees from a protected group being outplaced. Cf., Bartz v. Agway, Inc., 844 F. Supp. 106 (N.D.N.Y. 1994). To make a threshold disparate impact case, an outplaced employee typically must show a difference of two standard deviations between the percentage of outplaced employees in the protected class and the percentage of outplaced employees in the impacted workforce prior to the RIF. See Frazier v. Garrison I.S.D., 980 F.2d 1514 (5th Cir. 1993). Once a prima facie disparate impact case is made, an employer must demonstrate that the selection criteria is job-related and consistent with business necessity. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Both the ADEA and Title VII expressly disallow disparate impact claims when selection decisions are based on seniority. 29 U.S.C. § 623(f)(2); 42 U.S.C. § 2000e-2(h). The federal circuits are split on the question of whether a disparate impact claim is available under the ADEA. Compare Criley v. Delta Air Lines, Inc., 119 F.3d 102 (2d Cir. 1997); Lewis v. Aerospace Community Credit Union, 114 F.3d 745 (8th Cir. 1997), Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000), and E.E.O.C. v. Local 350, 998 F.2d 641 (9th Cir. 1993) with Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir.), cert. denied, 528 U.S. 811 (1999), E.E.O.C. v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994), Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996), DiBiase v. SmithKline
Beecham Corp., 48 F.3d 719 (3d Cir. 1995), and Lyon v. Ohio Education Ass’n, 53 F.3d 135 (6th Cir. 1995).

Under a disparate treatment theory, an outplaced employee who is a member of a protected class can make a prima facie case by showing only (1) that s/he was qualified for the job; (2) that s/he was subject to adverse action; and (3) that others outside of the protected class were treated differently. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Stokes v. Westinghouse Savannah River Co., 206 F.3d 420 (4th Cir. 2000); Dockins v. Benchmark Communications, 176 F.3d 745 (4th Cir. 1999); Runnebaum v. NationsBank of Md., N.A., 123 F.3d 156 (4th Cir. 1997). Once an employee has met this minimal burden, the burden shifts to the employer to defend its adverse action by demonstrating that it was taken for a legitimate non-discriminatory reason. Id.

A downsizing employer may not escape liability to an outplaced employee simply because its RIF was driven by an economic downturn or other legitimate business drivers. The former employee may still prevail if s/he is able to convince a factfinder that (1) the RIF itself was a pretext for discriminatory action; see McMahon v. Libbey-Owens-Ford Co., 870 F.2d 1073 (6th Cir. 1989); (2) while the RIF may have been legitimate, the individual’s non-selection was discriminatory, Shaw v. Titan Corp., 149 F.3d 1170 (4th Cir. 1998); or (3) while there are some legitimate reasons for the employee’s selection, there were also discriminatory reasons (so-called mixed motive cases), Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995).

Subjective criteria may provide a defensible basis for RIF selections, so long as the determination regarding the subjective criteria is based on objective facts. See Coleman v. Quaker Oats Co., 232 F.3d 1271 (9th Cir. 2000). For example, it would be legitimate for an
employer to consider both the objective sales figures produced by an employee and the business ethics the employee demonstrates. If the employee produced an extremely high sales volume, but did so by making misrepresentations to customers, it would be defensible to outplace him in lieu of a lower-producing colleague.

When outplacement decisions involve workgroups that include a wide variety of ages, it is important to distinguish age itself from factors that may be correlated with age. It is not uncommon when comparing employees with a significant age difference, for an employer to include in its assessment the relative salaries of its older and younger workers, or a presumption that the younger employee will stay with the employer for a longer period of time. The Supreme Court has held that employment decisions based on factors that are distinct from, but may be correlated with age, such as salary levels, do not violate the ADEA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), *cert. denied*, 513 U.S. 1013 (1994). However, presumptions regarding an employee’s future tenure based solely on age may cross the line as criteria prohibited by the ADEA. Moreover, under the ADEA, an employer may escape liability so long as it has some legitimate reasons for its decision, even if age was one criterion. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 (8th Cir. 1995). Under Title VII, however, an employer may be subject to an injunction and held liable for attorneys’ fees if its RIF selection was based on both legitimate and discriminatory criteria. *See Dunning v. General Electric Co.*, 892 F. Supp. 1424 (M. D. Ala. 1995).

**B. Anti-Retaliation Laws**

By statute, regulation and pursuant to case law developed on public policy grounds, employers are prohibited from retaliating against employees who engage in so-called “protected activity.” In general, protected activity is defined as action taken by an employee which
promotes some public policy and which has the potential to harm an employer. For example, whistleblower provisions in the Clean Air Act, 42 U.S.C. § 7622, Section 211 of the Energy Reorganization Act, 42 U.S.C. §§ 5851 et seq., and the False Claims Act, 31 U.S.C. §§ 3729 et seq., bar an employer from discriminating against an employee who reports violations of these Acts. Likewise, the federal equal employment opportunity laws prohibit retaliation against employees who raise EEO issues with their employers, see, e.g., 42 U.S.C. §§ 2000e et seq., and most Workers’ Compensation acts include anti-retaliation provisions, see, e.g., N.C. Gen. Stat. §§ 95-240 et seq. (1999). A retaliation claim may arise even when there has been no formal complaint. An employee may engage in protected activity simply by complaining to her supervisor that she has been sexually harassed by a co-worker or that her workgroup is engaged in unsafe activity. See, e.g., Hearn v. R.R. Donnelly & Sons Co., 460 F. Supp. 546 (N.D. Ill. 1978).

To make a prima facie case under most anti-retaliation laws, an employee need only demonstrate a temporal nexus between the employee’s protected activity and the employer’s adverse action. See Kahn v. Secretary of Labor, 64 F.3d 271 (7th Cir. 1995); Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995); Armstrong v. City of Dallas, 997 F.2d 62 (5th Cir. 1993); DeAnda v. St. Joseph Hospital, 671 F.2d 850 (5th Cir. 1982); Pace v. Paris Maintenance Co., 107 F. Supp.2d 251 (S.D.N.Y. 2000); Nguyen v. IBP, Inc., 905 F. Supp. 1471 (D. Kan.1995). If an employee is able to show that she engaged in protected activity near to the time s/he was outplaced, the burden will shift to the employer to prove that the outplacement determination was justified on grounds wholly unrelated to the protected activity. Id.
C. The Family Medical Leave Act

The federal Family and Medical Leave Act (FMLA) provides job protection for covered employees who take up to twelve weeks of leave to attend to their own or a family member’s serious health condition, or in the event of the birth or adoption of a child. 29 U.S.C. §§ 2601 et seq. Some state family leave acts provide even more liberal job protection. See, e.g. D.C. Code §§ 32-501 et seq.; Mass. Gen. Laws Ann., Chapter 149 Labor and Industries, Section 149:52D.

The job protection provided under the FMLA is rigid – most employees are entitled to reinstatement to the same or a substantially similar position to the one held immediately prior to the leave, unless the employee would have been otherwise displaced from the position for reasons unrelated to the leave. 29 C.F.R. § 825.100(c). Department of Labor regulations state that if an employee would have been laid off even if s/he had remained on the job, then the employee cannot challenge his/her layoff on FMLA grounds. 29 C.F.R. § 825.216(a)(1); see O’Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349 (11th Cir. 2000) (affirming judgment for employer who terminated employee on FMLA leave as part of RIF). Thus, if an employee is on FMLA leave when selected for outplacement, the employer should be prepared to show that it would have made the same decision even if the employee had not taken the leave. Similarly, when making selection decisions, an employer should not consider an employee’s FMLA protected absences. Hodgens v. General Dynamics Corp., 144 F.3d 151 (1st Cir. 1998).

D. The Americans with Disabilities Act

The Americans with Disabilities Act prohibits discrimination against a narrowly defined population deemed “disabled.” The ADA also requires employers to make reasonable accommodations for employees deemed disabled under the Act who can perform the essential functions of a job. 42 U.S.C. § 12111 (8) and (9).
Employers who consider an employee’s physical limitations or the collateral impacts of those limitations during the RIF selection process must carefully consider their ADA accommodation obligations. In connection with a downsizing, an employee’s position may be restructured in such a way that s/he can no longer perform the job’s essential functions. For example, when staff is cut significantly, an employer may not be able to accommodate an employee’s disability-related schedule requirements. *Earl v. Mervyns, Inc.*, 207 F.3d 1361 (11th Cir. 2000). Likewise, in restructuring an organization, an employer may change its per capita production standards, so that a disabled employee who could perform under a previous standard is no longer able to meet the essential functions of his/her job. *Milton v. Scrivner, Inc.*, 53 F.3d 1118 (10th Cir. 1995).

In either of these examples, the employer’s decision to displace the employee from the changed position may be defensible on the ground that the employee can no longer perform the essential functions of the position. \(^1\) However, the ADA analysis should not stop there. After determining that the employee cannot perform the essential functions of a post-RIF position, the employer should then determine whether the employee could perform the essential functions of the job if non-essential functions were shifted to other employees. If not, then the employer should consider whether there is another vacant position for which the individual is qualified,

\[^1\] The EEOC consistently has taken the position that the “essential functions” analysis applies only to the performance of particular tasks. The EEOC contends that employer modifications to *when* tasks are performed are subject to an undue hardship analysis. “Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA.”
perhaps with a reasonable accommodation, particularly if the employer is moving other non-disabled displaced workers into new positions.\(^2\)

Another potential ADA risk arises when an employer bases an outplacement determination on employee absences relating to a disability. Although numerous courts take the position that attendance is an essential function of almost any job, the EEOC takes the position that leave beyond that permitted under the FMLA may be a reasonable accommodation. *EEOC v. Yellow Freight System, Inc.*, 253 F.3d 943 (7th Cir. 2001); *Tyndall v. National Education Centers, Inc.*, 31 F.3d 209 (4th Cir. 1994); *Jovanic v. In-Sink-Erator Division*, 201 F.3d 894 (7th Cir. 2000); EEOC *Enforcement Guidance*, Q.17. The Agency’s *Enforcement Guidance on Reasonable Accommodation* takes this obligation further by claiming that a disabled employee’s performance should be evaluated only for the period in which s/he worked. *Enforcement Guidance*, Q.19. At least one Circuit Court, however, has held that an employer can defend a RIF selection process based on a performance appraisal, even when the appraisal considers absences resulting from a disability. *See Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997). Given the unsettled law in this area, prudent employers should consider thoughtfully whether to outplace an employee due to disability-related absences.

**E. Uniformed Services Employment and Reemployment Rights Act**

The Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq.*, protects the employment and reemployment rights of any individual who

\(^2\) The EEOC takes the position that disabled employees who no longer can perform the essential functions of a particular position should be given preferential reassignment to vacant positions. A number of courts considering this issue have held otherwise. *See, e.g.*, *Skrjanc v. Great Lakes Power Service Co.*, 272 F.3d 309 (6th Cir. 2001); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997), cert. denied, 522 U.S. 1115 (1998); *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001).
is absent from work as a result of service in the U.S. armed forces. Employees protected by USERRA include, among others, reservists called up to serve in the war in Afghanistan.

USERRA requires employers to reinstate employees to the position they would have achieved had their employment not been interrupted by military service. As with the FMLA, USERRA’s reinstatement rights are not absolute. An employer is not required to reinstate a veteran or reservist if “circumstances have so changed as to make such reemployment impossible or unreasonable . . . [or] such employment would impose an undue hardship on the employer.” 38 U.S.C. § 4312(d)(1)(A) & (B).

An employer may argue that a RIF driven by an economic downturn or other legitimate business factors constitutes changed circumstances that would render reemployment unreasonable or an undue hardship. USERRA legislative history: See H.R. Rep. No. 103-65, at 25 (1994) reprinted in 1994 U.S.C.C.A.N. 2449, 2458. In such cases it will be important to document the fact that the service man or woman would have been outplaced regardless of his or her military service.

F. The National Labor Relations Act and Collective Bargaining Agreements

Employers contemplating laying off bargaining unit employees may be required under the National Labor Relations Act (“NLRA”) to bargain with the union over the decision. If a layoff decision arises out of an employer’s relocation of bargaining unit work, the National Labor Relations Board (“NLRB”) can make a prima facie case for mandatory bargaining by showing that the relocation of the work was unaccompanied by a basic change in the nature of the employer’s operation. Dubuque Packing Co. & United Food & Commercial Workers International Union, 303 NLRB 386 (1991). An employer can rebut this prima facie case by showing:
• The work performed at the new location varies significantly from the work performed at the old location;

• The work performed at the old location is to be discontinued entirely or not moved; or

• The decision involved a change in the scope and direction of the enterprise. Alternatively, the employer may show that

• Labor costs were not a factor in the decision, or

• Even if labor costs were a factor, the union could not have offered concessions that could have changed the employer’s decision to relocate.

Even if it is determined that an employer’s layoff decision is not a subject for collective bargaining, the employer must nonetheless bargain over the effects of the layoff. Layoff effects subject to bargaining include how those laid off are selected, whether the employer will provide severance benefits and what transfer and reemployment rights will be provided to displaced bargaining unit members. As a practical matter, such issues are typically addressed in collective bargaining agreement. However, in those cases where the issues have not been addressed, once a RIF decision has been made, the employer should promptly notify the appropriate union representatives to initiate negotiations over RIF effects.

G. Employee Handbook Claims

Some jurisdictions recognize policies in an employee handbook as giving rise to a contract claim. See Sewell et al. v. Black Butte Coal Co., 963 F.2d 382 (10th Cir. 1992). Therefore, an employer should review carefully the material in its handbook relating to lay-offs to ensure that its selection criteria is consistent with its written policy.
III. Planning a RIF

In addition to the concrete legal risks discussed in Section II, mass lay-offs typically have other collateral impacts on a business. RIFs disrupt the workplace and may lead to decreased morale, diminished loyalty and lower productivity among the employee survivors. In addition, a mass layoff may end up front page news in a company’s community, leading to a loss of confidence in the business on the part of customers, increased confidence in the competition (they didn’t have to lay anyone off, they must be better managers) and difficulties in recruiting new workers. Recruiting may be particularly difficult if an employer realizes within months of a RIF that it has cut too deeply.

The key to minimizing the potential negative impacts arising out of a RIF is thoughtful planning. Mass lay-offs should not occur as a panicked reaction to losing a large account or to a temporary slowdown in the local or national economy. An employer should carefully study the reasons for and implementation of a layoff and document this planning process. This documentation may be helpful in the event the RIF be challenged as a pretext for discriminatory actions. See, e.g., McMahon v. Libbey-Owens-Ford Co., 870 F.2d 1073 (6th Cir. 1989) (judgment for plaintiffs upheld because they established that immediately prior to layoff defendant hired new managers at a cost which exceeded the savings from the layoff). If contemporaneous documentation is created, courts typically are hesitant to second-guess an employer’s decisionmaking. See EEOC v. Louisiana Office of Community Servs., 47 F.3d 1438 (5th Cir. 1995) (hiring panel’s decisions upheld when panel evaluated applicants based on “interview packet” consisting of application, narrative by applicant detailing job knowledge and qualification, summary of references, and interview notes).

The factors to be considered and documented should include the following:
The financial conditions giving rise to the RIF

The goals of the RIF

The job functions and/or skills necessary post-RIF

Limitations on workforce reductions

The way in which outplaced employees will be selected

Consideration, design and implementation of a severance plan

The remainder of this paper will provide a summary of these planning steps. For a more complete treatment of the RIF planning process, the author recommends The Rightsizing Remedy by Charles F. Hendricks; and Corporate Counsel’s Guide to Reduction In Force, by William A. Hancock.

A. Analyze the financial conditions giving rise to the RIF

Given the numerous potential negative impacts, an employer should consider whether it can achieve its cost saving goals by an alternative means. Critical to this analysis is assessing whether the financial condition at issue is due to relatively short-term economic conditions, or a fundamental change in the market for the goods or services that a company provides. In many cases, this determination may be impossible to assess. However, when it is possible that a company’s financial condition will improve in the future, short-term cost-saving mechanisms may be the answer.

Potential cost savings mechanisms that allow an employer to maintain its full time workforce include the following:

- Hiring and/or wage or wage increase freezes
- Reductions in benefits or employer-sponsored benefit subsidies
• Work furloughs or reduced hour scheduling
• Discontinuing the use of temporary or part-time labor and redistributing the work performed by this group
• Assessing attrition rates

There are numerous circumstances in which these alternatives will not suffice. Common examples of when a RIF may be necessary include (1) layoffs to reduce workforce redundancies following a corporate merger, (2) layoffs as a result of a change in work processes, and (3) layoffs where a company is quitting business in one or more locations or is getting out of a particular business altogether.

B. Set Goals

Once an employer has determined that there are no viable alternatives, it should determine what it wants to accomplish with the RIF and when. The goal may be to cut costs across the board. In that case, the employer will want to examine workgroups throughout the company to determine where layoffs would least impact daily operations. Another goal may be to reorganize work processes in specific groups to eliminate redundancies and better leverage skills and technology. Yet another goal may be to close down either an entire business unit or specific business locations.

C. Select the Positions to be Eliminated

An employer should be able to tie its workforce reductions to its goals. To do so, an employer should start by determining what work will be performed post-RIF and what positions will be used to perform it. In performing this analysis, an employer should first identify the pool of positions it wants to examine for potential cuts. Whenever possible, management should focus on the positions and skills required to perform the post-RIF work in the most efficient
manner. When circumstances allow, the post-RIF work should not be planned around the skill sets of a predetermined set of individual workers who will survive the lay-offs.

After determining what positions will perform the work, the employer should then compare the post-RIF organization with its current organization to determine where the cuts will come. The positions subject to this comparative analysis should fall into one of the following three categories:

(1) the position will exist post-RIF with identical requirements and responsibilities;
(2) the position will exist post-RIF with some of its pre-RIF requirements and responsibilities as well as new post-RIF requirements and responsibilities;
(3) the position will not exist post-RIF because the work done by the position pre-RIF has been moved to other positions either in whole or in part, or because the employer will not need the pre-RIF work done post-RIF.

Potential staffing changes and cuts will focus on the categories two and three positions.

D. Examine WARN Act Obligations

Once an employer has determined how many and where positions will be eliminated, it must then determine whether it has a duty to provide pre-RIF notice to impacted employees under the federal Worker Adjustment and Retraining Notification Act (“WARN”). The Act applies to employers with more than 100 employees who work in the aggregate more than 4000 hours per week. WARN requires that employers provide 60 days notice to employees and state and local governments agencies in the event of a “mass layoff” or “plant closing.” 29 U.S.C. § 2102. The focus of WARN’s notification triggers is on where the impacted employees are located. RIFs involving small numbers of employees at multiple, geographically dispersed locations are typically not covered by WARN.

WARN defines “plant closings” to include any closing of a “single site of employment” for six months or more when the closing results in an employment loss for more than 50 workers.
during a 30-day period, 29 U.S.C. § 2101(a)(2). An employment loss is deemed to occur if a worker either loses his/her job, or if the worker’s hours are reduced by more than 50% for six months or more. 29 U.S.C. § 2101(a)(6).

For purposes of WARN, a “mass layoff” occurs when 33% of the workers at a single site of employment are terminated during a 30-day period, if the impacted workforce consists of more than 50 workers. 29 U.S.C. § 2101(a)(3)(B)(i)(I) and (II). WARN’s mass layoff trigger may also occur if, during a 90-day period, two or more RIFs occur which would not trigger the Act’s notice requirement standing alone, but would if counted together. 29 U.S.C. § 2102(d). Any layoff covering 500 or more employees at a single site of employment triggers WARN’s notice requirements. 29 U.S.C. § 2101(a)(3)(B)(ii).

Failure to comply with WARN’s notice requirements may result in liability to affected employees for back pay and benefits for each day of the violation up to 60 days. As a practical matter, some employers would prefer to provide 60 days pay to employees in lieu of notice. However, employers who provide compensation in lieu of WARN notice should note that such compensation must be in addition to any other severance benefits to which the employee is entitled.

In addition to federal WARN requirements, employers may be subject to state notification requirements as well. At least twelve states have statutes that require certain private employers to give employees advance notice of plant closings and mass layoffs.3

E. Design and Implement a Selection Process

3 The following states have enacted pre-RIF notification requirements applicable to private employers: California, Connecticut, Hawaii, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, South Carolina, Tennessee and Wisconsin.
After designing the post-RIF organization, the employer must determine how it will select the workers who will, and more importantly for purposes of risk management will not, fill the positions. In designing a selection process, an employer should first consider what limitations, if any, already exist. Most collective bargaining agreements include specific provisions addressing how layoffs involving bargaining unit members will be implemented. An employer may also have workers under contract who may be entitled to be paid for a specific term, so that even if they were laid off, the employer would experience no cost savings as a result. Finally, an employee handbook may specify the way in which individuals are selected for layoff. As discussed in Section II, in some jurisdictions such handbook provisions may create contractual obligations on the part of the employer.

An employer with no preexisting limitations must then determine whether it will use objective or subjective criteria in making selection decisions. The upside to using objective criteria is the simplicity in making selection decisions and in later explaining them. If used consistently, the legal risks arising out of objective RIF decisions are minimal. The downside to using objective criteria is that an employer could lose its highest performing employees.

Objective criteria are simplest to use when the job requirements for a given position have not changed and there will be fewer workers in the position going forward. Objective criteria may also be used when the requirements of a position have changed due to a reallocation of job duties and there are more individuals qualified for the redesigned position than there are available positions. In the latter circumstance, an employer will need to determine how it will define who, among qualified candidates, should be considered for the position. The pool may include only those who were in the positions before they were redesigned. An employer may want to expand the pool to consider both those who were in the position before it was redesigned.
as well as those in positions that have been eliminated whose work has been moved to the redesigned positions.

Once the pool of qualified individuals has been selected, defensible objective selection criteria include:

1. Seniority (common under collective bargaining agreements)
2. Lottery
3. Measured quantity of production
4. Elimination of complete job classifications
5. Compensation levels

One potentially risky objective criteria is pension eligibility if pension eligibility is driven exclusively by age. The Supreme Court has ruled that pension eligibility was a legitimate selection criteria if the pension eligibility was based on years of service, rather than age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), *cert. denied*, 513 U.S. 1013 (1994). The Court indicated that if pension eligibility is based solely on a worker’s age, consideration of that criterion could be deemed a proxy for age, giving rise to an age discrimination claim.

Subjective selection criteria allow an employer to keep its better performing employees, to ensure that its leaner post-RIF workforce operates at maximum efficiency. While employers have been able to defend subjective selection processes, *see Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231 (4th Cir. 1991); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000), *cert. denied*, _U.S._, 121 S. Ct. 2592 (2001); *Hawkins v. Pepsico, Inc.*, 203 F.3d 274 (4th Cir. 2000), the potential risks of subjective decisionmaking are exponentially higher than those associated with objective criteria.
The key to defending subjective selection criteria is in the process used. Before making any selection decisions, an employer should carefully document the job requirements for the post-RIF positions and the selection criteria that will be used. For example, if management has decided to add customer service responsibilities to a position that previously required performing individualized technical functions, the selection criteria for the post-RIF position might include both technical competency and inter-personal skills. When both criteria are used in the evaluation process, an incumbent with strong technical skills who does not get along well with others may not be the most qualified candidate. See, e.g., Anderson v. Genuine Parts Co., 128 F.3d 1267 (8th Cir. 1997) (during reorganization process it was legitimate for employer to assess demoted employee’s performance against outside sales reps, rather than the defendant’s sales requirements).

Once the skills and selection criteria have been determined, an appropriate candidate pool should be selected. As discussed in connection with objective criteria, the candidate pool may include incumbents only, or incumbents as well as workers displaced from other positions who are qualified for the post-RIF position. The inclusion of workers outside these two groups may be risky, particularly if someone not currently performing any portion of a position’s post-RIF work unseats an incumbent and/or gets a promotion. The movement of someone not previously doing the impacted work into an impacted position may result in challenges from both unseated incumbents as well as non-incumbents who were qualified, but not considered for, the post-RIF position. The employer should consider whether the pool as defined includes employees on leave. Employees whose leave is covered by the FMLA must be considered during the selection process.
After defining the candidate pool, management familiar with the skills of the impacted workers should perform a relative ranking. It is important to have more than one decisionmaker to ensure both the integrity of the process and the appearance of fairness post-selection. The documentation prepared during the selection process should include evaluation or ranking forms, to demonstrate how the decisions were made. The rankings themselves should be based on historical documentation such as performance evaluations. If past performance evaluations do not include all of the criteria relevant to evaluating an individual for a redefined post-RIF position, management should be able to support its relative assessment with other objective data. See, e.g., EEOC v. Texas Instruments, 100 F.3d 1173 (5th Cir. 1996) (legitimate for employer to ignore past performance evaluations that did not provide “worthwhile information about the comparative worth” of employee) (emphasis in original). See also Coleman, 232 F.3d at 1282-86. As discussed in Section I.D., employers who consider attendance as part of a subjective evaluation process should be mindful of potential ADA and FMLA risks associated with negative consideration of absences covered by those Acts.

E. Reassignment of Displaced Workers

Once positions in the new organization have been filled using either objective or subjective criteria, the employer must determine whether the unassigned workers will be assigned to other positions. As discussed above, the employer may want to place workers whose jobs have been eliminated or who otherwise have been displaced in the pool for positions in an impacted organization. An employer may also consider placing displaced workers in vacant positions outside of the impacted organization. While an employer may have legitimate reasons for wanting to retain a high-performing displaced worker, risks arise when jobs are offered to some displaced workers but not others if the employer cannot articulate an objective non-

F. Review Selection Decisions for Potential Risks

Once selection decisions based on subjective criteria have been made, they should be reviewed by a non-decisionmaker to assess potential legal risks. It is preferable to have this review facilitated by counsel so that the employer can assert the attorney-client privilege over documents and discussions related to the review should litigation arise. However, if the employer does not have in-house counsel, and does not want to get outside counsel involved, trained human resources personnel may also effectively perform a risk analysis.

At a minimum, the risk analysis should include (1) an adverse impact analysis; and (2) employee file review. An adverse impact analysis should begin with a comparison between the demographics of the pre-selection workforce and those of the post-selection workforce. As discussed in section I, impacts that should be analyzed further are those in which there is more than a two standard deviation difference between the placement rates of individuals in particular demographic groups. If the data indicates an adverse impact, the person conducting the risk analysis should carefully review the selection criteria to ensure that it is job related and consistent with business necessity. See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

After looking for potential adverse impact, the person performing the risk analysis should then review the personnel files for both impacted and non-impacted employees. Red flags to look for during the file review include:
(1) employees with less experience being retained while employees with greater experience are outplaced;

(2) employees with outstanding performance evaluations being outplaced while employees with mediocre performance evaluations or code of conduct problems are retained;

(3) attendance issues impacting job performance or performance rankings that are related to an FMLA or ADA-related leave of absence; and

(4) recent protected activity such as a sexual harassment or safety-related complaint.

When such red flags appear, it is important that the decisionmaker be consulted to ensure that the selection decision can be defended on legally sufficient grounds. Explanatory information not currently in an employee file explaining the bases for the defensibility of a selection decision should be documented. In addition, where adverse impact has been identified, particular care should be taken when comparing the files of selected and non-selected employees to ensure that subjective selection criteria have been applied consistently. Decisions that cannot be easily defended should be reconsidered.

G. Considering and Designing a Severance Plan

A downsizing employer should consider whether it will provide severance benefits to its laid off workers. There is no federal or state requirement that employers provide severance benefits. Many collective bargaining agreements require severance benefits and some employers provide for severance payments in their employee handbook.

1. Reasons for Providing Severance Benefits

Many downsizing employers believe that the financial conditions driving a downsizing make it imprudent to provide severance benefits. Unless the employer is on the brink of liquidation, this is rarely the case. A properly structured severance plan can be an effective risk management tool, allowing an employer to spend money to provide transition benefits to all
outplaced employees, rather than to pay lawyers to defend lawsuits brought by a few. In addition, a consistently applied severance program may improve retention rates for post-RIF employees, serve as a recruiting tool post-RIF and reduce the negative publicity arising out of a RIF.

2. Benefits included in a severance plan

The most common form of severance benefit is severance pay, provided either in a lump sum or in the form of post-termination salary continuation. The amount of severance pay is typically determined by a formula that considers the position from which the employee is outplaced and the employee’s length of service. Executives may receive between one and four weeks’ salary for each year of service, middle management between one and two weeks of pay for each year of service, and others one week for each year of service. Other common severance benefits include extended health care coverage either through COBRA subsidies or remaining in an employer’s plan, and job counseling and other reemployment services.

3. Release programs

In terms of risk management, the most effective severance program is one that conditions the receipt of all or part of the program’s benefits on the execution of a release by the outplaced employee. Courts have held that such conditions are legitimate. See DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 721 (3rd Cir.), cert. denied, 516 U.S. 916 (1995); Adams v. Moore Business Forms, Inc., 224 F.3d 324 (4th Cir. 2000); O’Shea v. Commercial Credit Corp., 930 F.2d 358 (4th. Cir.), cert. denied, 502 U.S. 859 (1991). In order for a release to cover claims under the ADEA, the employer must comply with the requirements of the Older Workers Benefit Protection Act (“OWBPA”). These requirements include the following:

1. The release must be written in “simple English”;
The release must refer expressly to the ADEA;

The release must cover only claims arising before the release is executed;

The release must be in exchange for something of value;

The outplaced employee must be advised, in writing, to consult with an attorney;

The employee must be given 45 days in which to consider whether to sign the release; and

The employer must disclose the ages and job titles of those in the relevant job classification or department who will not be laid off.

An employer who fails to follow OWBPA’s requirements, may not use a release as a defense to an ADEA claim. To add insult to injury, an outplaced employee may be able to retain his or her severance benefits and still sue the employer under the ADEA if OWBPA has not been followed. See Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998).

An employer who has followed OWBPA to the letter may still have to respond to an EEOC charge alleging claims under the ADEA or another federal anti-discrimination law. An outplaced employee cannot waive his or her right to file a charge with the EEOC, and the EEOC may still pursue an action on behalf of an outplaced employee because the EEOC is not a party to the release. As a practical matter, the EEOC is less likely to pursue an action on behalf of an employee who has received some form of severance benefits. Similarly, a former employee who has received severance benefits may feel s/he has been treated fairly faces less economic desperation between jobs and will as a result, be less likely to spend the time and energy it takes to pursue an EEOC charge or other legal claim.

4. ERISA Requirements
Written employer severance plans calling for periodic payments may be covered by the Employee Retirement Income Security Act of 1974 (“ERISA”). The writing may be a formal plan document or a provision in an employee handbook describing severance benefits. An informal severance program may also be covered by ERISA, on the basis of an employer’s oral representations, the existence of a fund or account from which benefits are paid, the actual payment of benefits, past practice, the reasonable expectations of employees or the intentions of the sponsor. ERISA does not cover severance plans comprised solely of lump sum payments to outplaced employees.

Most severance plans are deemed health and welfare plans by ERISA. Severance Plans deemed health and welfare plans are subject to minimal procedural and substantive regulation. The procedural requirements include:

1. The employer must make periodic reports to the U.S. Department of Labor;
2. The employer must disclose the contents of the severance plan to employees; and
3. The plan must include a claims procedure for those who feel they have been wrongfully denied severance benefits.

29 U.S.C. §§ 1021, 1133. The substantive requirements include:

1. The terms must be reasonable; and
2. The administration of discretionary features of the plan must not be arbitrary and capricious.


4 A severance plan is deemed a pension plan under ERISA only if it is (1) contingent upon the employee’s retirement; (2) includes payments equal to more than twice the employee’s annual salary; and (3) provides for payments to be made over more than two years.
To meet these ERISA standards, an employer should include the following features in its severance plan:

1. Identification of the specific triggers for severance benefits (e.g., termination, demotion, relocation) and reserve management discretion in other situations;

2. A definition of the benefits to be provided, based on a formula or otherwise;

3. An express notice that a purchase of the company or its assets will not trigger benefits unless the employee actually experiences a defined employment loss;

4. An express condition that execution of a release is a condition to the receipt of severance benefits;

5. A claims procedure which identifies a Plan Administrator; and

6. A reservation of rights permitting the employer to modify or eliminate the benefits at any time.

Once the plan is drafted, management should put checks in place to ensure that it is applied consistently to all outplaced employees.

H. Preparing a Communication Plan

As discussed above, an employer may be required by the WARN Act to provide 60 days notice before laying off workers. An employer may also have a pre-RIF notice obligation under a collective bargaining agreement or may have committed itself to providing advance notice in an employee handbook. Even when there is no legal obligation to notify employees pre-RIF, it is nonetheless important to consider when and how to communicate with workers once the determination to cut jobs has been made.

The most significant reason for communicating early and often is to squelch the rumor mill. Regardless of what they are told by management, employees know when business is down in their workplace, and in their community. If management is not forthcoming about its layoff plans, workers will fill in the blanks for themselves, so that the information gap is filled by
rumors, many of which will be inaccurate. Inaccurate rumors can result in considerable workplace disruption and unwanted employee turnover. In terms of managing post-RIF risks, management should consider that workers who believe they were treated honestly and humanely are less likely to bring claims.

Information that the employer should consider communicating before a layoff includes the following:

1. The fact that worker reductions will occur;
2. Where the reductions will occur;
3. How many reductions will occur;
4. How those outplaced will be selected;
5. When the outplacements will occur; and
6. What, if any, severance benefits will be provided.

This information may be provided in a single communication, or a series of communications, depending upon the length of time an employer has to plan a RIF.

Once selection decisions are made, management should plan to provide individualized notification to each impacted worker if at all possible. The communication should be made in a private setting and should be brief, direct and firm. Where a number of employees must be notified, it may be a good idea to prepare talking points in advance so that displaced workers receive a consistent message. The communicator should be able to provide information regarding the availability of severance benefits and know where to send the employee for additional information. Management should do its utmost to ensure that displaced workers are given every opportunity to maintain their dignity both during and after the communication is made.
Once all impacted workers have been notified, an employer should communicate to its non-impacted workers that the RIF is complete. This communication should provide objective facts regarding the numbers and locations of outplaced workers. Neither in this communication nor under any other circumstances should management discuss with non-impacted workers any individual selection decision. If the media makes inquiries regarding the RIF, management should ensure that any information provided to the media is also provided to workers.

IV. Conclusion

An employer’s decision to layoff workers is fraught with risks and should not be made in haste. The key to risk management when laying off workers lies in taking a thoughtful approach that recognizes both the legal and significant employee relations issues that can result from a Reduction in Force. An organized RIF plan, such as the one discussed above, should assist employers in managing the RIF process so that the impacts of employee layoffs do not continue for years to come.