



## **Legal and Practical Solutions to Continue to Reduce Costs and Restructure the Workforce**

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# Legal and Practical Solutions to Continue to Reduce Costs and Restructure the Workforce

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## Why are we here? Because of the economy.....

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- **More than 2 million workers have been laid off in the U.S. since September 2008.**
- **Jobless rate up to 9.0% in January 2010.**



## More than simply trimming the budget

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- How do I identify where to make cuts?
- What criteria will I use to make those choices?
- Are those criteria legal? Fair?
- What are my legal obligations?
- How do I convey the information?

## General Considerations

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- Choose the right solution to the problem
- Develop a selection method
- Identify (and/or select) the decision maker(s)
- Analyze selected and nonselected groups
- Develop and utilize a communication plan

## Legal Liabilities Arising from Downsizing

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- Major sources of potential legal liability:
  - Anti-discrimination laws
  - Family and Medical Leave laws
  - Plant closing laws
  - Other contracts
  - COBRA continuation for former employees

## Anti-Discrimination Laws

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## Age Discrimination in Employment Act (“ADEA”).

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- Any RIF motivated by a desire to eliminate older workers is unlawful.
- Direct evidence of such a desire could include spoken comments, remarks found in internal company documents, or other evidence.
- Prima Facie Case: (1) he or she is 40 or over, (2) is selected for discharge from a larger group of candidates, (3) is performing at the same level or higher than some persons in the group retained, and (4) the residual workforce contained some younger persons who perform at a lower level than the plaintiff.
- **Objective criteria are essential.** Whether certain types of positions are identified for elimination, or whether individual evaluations are used, the criteria must be objective and cannot include factors such as “potential” or “future” that are mere proxies for age. Watch for loaded words used by evaluators that may reveal bias or which may be taken out of context.

## Older Worker's Benefit Protection Act ("OWBPA")

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- The OWBPA amended the ADEA. Allows employers to offer "voluntary early retirement incentive plans" without committing a per se violation of the ADEA.
- OWBPA also sets standard for knowing and voluntary waiver of rights under the ADEA. Severance or settlement agreements that do not comply with these strict requirements will be unenforceable.
- Generally, the requirements are:
  - 45 day consideration period
  - 7 day revocation period
  - Informed of right to consult with an attorney
  - Voluntariness
  - Receipt of compensation to which s/he was not otherwise entitled
- OWBPA requires employers to provide statistical information to those over 40 affected by "group" lay off. A "group" may consist of a very small number of employees (two (2) or more).

## Title VII

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- A RIF is unlawful if motivated by a desire to eliminate workers belonging to any legally protected category, such as race, color, religion, sex, national origin, and additional categories under applicable state or municipal laws.

## Americans with Disabilities Act (“ADA”).

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- Use caution to ensure that the objective selection criteria used to structure a RIF do not violate the ADA.

## Family and Medical Leave Act (FMLA)

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- FMLA leave cannot be a factor in the decision to eliminate an employee's job.
- Employees are entitled to return to same or equivalent position, UNLESS employee would have been laid off whether or not s/he was on leave.
- FMLA requires return to same or equivalent position. Consideration must be made to providing alternative position if others not on FMLA are reassigned.

## Contracts

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- Have you arguably agreed not to layoff anyone?
  - Employment contracts
  - Implied employment contracts
  - Promissory estoppel
  - Damages in any contract claim limited to expectation losses
- Do you have obligations under other contracts that might be affected or triggered by a plant closing or layoff?
  - Benefits plan documents that fail to reserve the Company's right to terminate can raise ERISA problems

## Plant Closing Laws Plant Business Closing/Layoff

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	<b>Federal</b>	<b>Illinois</b>
<b>Covered Employer</b>	<b>100</b>	<b>75</b>
<b>Covered Layoff</b>	50 Employees or 33% of employees (whichever is greater) or 500 employees	25 Employees or 33% of employees (whichever is greater) or 250 employees
<b>Notice Requirement</b>	<b>60 days</b>	<b>60 days</b>

## Alternatives to Layoffs

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- Reduction in hours
- Hiring freeze
- Reduce benefits
- Salary/wage freezes or cuts
- Voluntary retirements
- Other cost cutting

## Reduction in Hours

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- Reduce the length of the workweek
- Reduce the length of the workday
- Implement flexible scheduling, including movement from full time to part time
- Reduce overtime
- Consider voluntary leave without pay or furloughs; must consider possible effect on exempt status
- Shut downs

## Hiring Freeze

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- Make exceptions for critical needs
- Make exceptions to attract very high quality recruits

## Reduce benefits

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- Eliminate or reduce 401(k) matching contributions
- Eliminate perquisites
- Reduce health benefit costs by moving to a high deductible health plan or requiring employees to pay a greater share of the cost of benefits
- Create a flexible benefit plan so that employees can purchase the benefits they need

## Salary/Wage Freezes or Cuts

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- Implement pay for performance

## Voluntary retirements

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- Severance arrangements can be subject to ERISA; can be advantages to governance by ERISA
- Retain company discretion to offer option to employees

## Other Cost-Cutting Measures

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- Enforce rules and policies
  - Attendance
- Reduce business travel
  - Cancel unnecessary business trips
  - Use teleconferences
- Consider outsourcing or subcontracting

## Other Cost-Cutting Measures

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- Reduce or eliminate overtime
- Mandatory or voluntary furloughs
- Job sharing/flexible scheduling (no benefits)

## Share the Pain Plus the Gain

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- If you can utilize an alternative to layoffs, be sure to inform your employees this was done in lieu of layoffs.

## Intangible Costs of Reducing Costs

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- Disgruntled workers
- Survivor morale
- Public image
- Relation of cost reductions to other pending litigation or business activity



## Tangible Costs of Plant Closings and Reductions in Force

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- Unemployment compensation
- Worker's compensation claims
- Disability insurance claims
- Potential legal liabilities



## Welfare and Retirement Plan Issues

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- COBRA Obligations
- Will it affect your insurance premiums?
- Reduction of more than 20% could trigger “partial termination” of retirement plan = fully vesting some employees
- Demands for immediate distributions of retirement benefits



## Checklist for the Final Day

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- Handling the Exiting Employees

# QUESTIONS?

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Thank You!

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