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**Portfolio Media. Inc.** | 648 Broadway, Suite 200 | New York, NY 10012 | [www.law360.com](http://www.law360.com)  
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | [customerservice@portfoliomedia.com](mailto:customerservice@portfoliomedia.com)

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## **Reductions-In-Force: Best Practices**

Law360, New York (January 27, 2009) -- In a recent survey, approximately 60 percent of employers indicated that they will likely institute layoffs in the next 12 months. In November 2008, the number of reductions-in-force at U.S. companies were up an astounding 275 percent annually as a result of the deepening economic recession.

Before implementing a reduction-in-force, employers may want to consider other alternatives because of the impact a reduction will have on the remaining workforce. Alternatives include work sharing arrangements, hiring freezes, voluntary exit incentives, temporary shutdowns and reductions in the work week.

Voluntary separation programs or early retirement programs, when implemented prior to a planned involuntary reduction, are most effective when the possibility of upcoming layoffs is clearly communicated to all employees.

It is important, however, to avoid the implication that any employee who refuses to accept a voluntary exit incentive will be terminated involuntarily at a

later date. This could result in an employee who accepts a “voluntary” separation subsequently claiming that he or she was constructively terminated.

Most employers find it advantageous to offer severance benefits to voluntarily or involuntarily separated employees in exchange for release agreements. However, these releases are not immune from attack.

The Older Worker Benefit Protection Act (“OWBPA”) mandates that releases of age claims must meet certain requirements. While OWBPA only affects age discrimination claims, as a practical matter, it affects releases of all claims because it would be overly burdensome for an employer to request two separate releases from its terminated employees.

OWBPA has various straightforward requirements, such as a 45-day consideration period for releases executed in connection with a termination program, a seven-day revocation period and a prohibition on the release of future claims.

On the other hand, OWBPA’s required informational disclosures, such as the description of the decisional unit and eligibility factors, can be tricky.

For example, many employers have assumed that the eligibility factor requirements can be met by simply stating that all employees selected for termination were eligible for the severance benefits/release program.

However, recently courts have invalidated releases based on the fact that the

employer did not provide the selection criteria for the reduction-in-force itself. See, e.g., *Pagliolo v. Guidant Corp.*, 483 F. Supp. 2d 847, 860-61 (D. Minn. 2007); *Commonwealth of Ma. v. Bull HN Info. Sys.*, 143 F. Supp. 2d 134, 147 (D. Mass. 2001).

In addition, decisional units that are too broadly or too narrowly described in the disclosure have resulted in the release agreements being invalidated with respect to a former employee's age discrimination claims.

Additional questions arise with respect to the proper scope of the decisional unit if the actual termination decisions are subject to higher level company review.

The Workers Readjustment and Training Notification Act ("WARN") requires employers to give 60 days notice, or pay and benefits in lieu thereof, to their employees before closing a plant or implementing a mass layoff.

This technical act contains numerous definitions regulating everything from what constitutes an employer (100 or more employees) to what constitutes an employment loss (termination, reduction in hours, layoff).

Fortunately, the thresholds for a plant closing (must affect 50 or more employees) and mass layoff (500 or more employees or 50 or more employees representing at least 33 percent of the workforce) are fairly high, especially considering that only a single site of employment is included (i.e., a layoff occurring at many different facilities that, in total, affects 500 employees does not necessarily trigger WARN at any of the single sites). In addition, the scope

of WARN liability extends to parent or related entities who are deemed to be a single employer with the company that implemented the mass layoff or plant closure.

Many states, including New York, New Jersey, Illinois, California and Hawaii, have enacted their own "Baby WARN Acts" which often cut down on these thresholds. For example, the New York WARN Act basically cuts each number in the federal WARN Act in half, except, of course, the notice period, which it increased to 90 days.

The selection process used for involuntary reductions-in-force can also trigger litigation.

When making selections, employers typically look to a combination of factors, including seniority, past performance, peer review and special reduction-in-force evaluations which evaluate not only past performance, but an employee's ability to perform the necessary job functions in the post-reduction environment.

After identifying the criteria for selecting employees for a reduction-in-force, an employer must also determine who will participate in the selection process.

In many instances, it is advisable for an employer to have supervisors perform the evaluation or ranking process prior to being informed of the number of potential cuts that may occur within the affected department. Alternatively, employers may form a committee to apply the selection criteria and reach a

consensus as to employee ranking.

All decision makers should receive copies of the selection criteria, receive training in applying the criteria and receive EEO training so that they understand legal nondiscrimination requirements and the importance of avoiding any prohibited bias in the selection process.

Another consideration is the fact that reductions-in-force can generate discrimination claims which encompass intentional and adverse impact theories.

Discrimination can be established if facially neutral policies have an adverse impact on a protected class, unless the selection criteria used in the reductions can be justified as being job related and consistent with business necessity.

Adverse impact data may also be used as evidence in disparate treatment cases. It is, therefore, imperative to perform a statistical impact study once preliminary decisions are made. This study should be part of the oversight review, before final implementation.

When implementing a reduction-in-force it is important to remember to pay the terminated employees all of their earned wages and benefits in a timely manner. Each state has different timeframes for when terminated employees must be paid and also what benefits must be paid.

For example, California law requires payment of accrued, unused vacation time while Texas allows an employer's policy to control whether an employee is paid vacation upon termination. The cost savings of a reduction-in-force can easily

be offset by expensive wage and hour litigation.

Implementing a reduction-in-force is a complicated process both logistically and legally. Reductions-in-force require planning and careful consideration in order to avoid costly legal battles that destroy the cost of the anticipated savings from a reduction-in-force.

--By Jonathan C. Wilson and John M. Farrell, Haynes and Boone LLP

*Jonathan Wilson is a partner with Haynes and Boone in the firm's Dallas office.*

*John Farrell is an associate with the firm in the Dallas office.*

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