

# PUBLICATION

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## Possible RIF Pitfalls For Employers

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Economic conditions have led many employers to consider reductions in workforce (RIF). For some businesses, RIFs are a necessary step to weathering the economic storm. Employers considering a RIF should keep in mind several legal considerations when evaluating this difficult decision.

First, RIFs of certain sizes may trigger the requirements of the Worker Adjustment and Retraining Notification Act (WARN Act). If an employer conducts a mass layoff or plant closing, as each is defined in the WARN Act, the WARN Act requires the employer to give the affected employees, their union (if one), the applicable state dislocated worker agency, and chief elected official of the local government 60 days advance written notice. There are exceptions to this requirement, but they are fact specific and difficult to meet. There are significant penalties for failure to comply with the WARN Act. Additionally, a growing number of states have their own WARN Act-type notification laws.

Employers conducting a RIF are often subject to discriminatory termination claims if some employees are retained or transferred while others are laid off. Courts have rejected such claims when the employer can show a legitimate and nondiscriminatory reason for laying off certain employees and keeping others. Furthermore, an objective plan prepared in advance of the RIF may be a defense to discrimination claims. This may mean that the employer will have to articulate a reason for the decision as to each individual employee. Conversely, the lack of a plan may lead a court to decide that a RIF was merely a pretext to conduct discriminatory terminations.

Severance agreements and their accompanying releases are another important consideration when conducting RIFs. Releases, however, are subject to a distinct and complex area of labor law. Generally, claims brought under federal law are waivable, although Fair Labor Standards Act claims cannot be released as a condition to a severance agreement. Adding to the confusion, the U.S. Circuit Courts are split as to whether Family Medical Leave Act (FMLA) claims can be waived. The issue may have been settled recently when the Solicitor General of the United States filed a brief with the Supreme Court expressing support for allowing the waiver of retrospective but not prospective FMLA claims. Releases of age discrimination claims are even more complicated. The Age Discrimination in Employment Act mandates several requirements unique to age claim releases, including consideration that the employee would not otherwise be entitled to, a twenty-one or forty-five day period to allow the employee to review the release, a seven-day period during which an employee can revoke the release, and a requirement that statistical data about the RIF be gathered and given to affected employees.