

[about Morgan Lewis Workforce Change](#) | [WARN concepts](#) | [archive](#) | [sign up](#) | [forward to a friend](#) | [contact](#)

Morgan Lewis provides Workforce Change Inside Business periodically to executives and in-house attorneys responsible for the employment, labor, benefits, and other legal issues arising from workforce reductions, corporate transactions, and other types of restructuring.

Workforce Reduction Planning

Most workforce reductions arise in circumstances where there is a need for speed. A RIF is needed to lower costs, realign the business, and retain the people who are best qualified to position the company for the future. However, few RIFs will achieve these underlying business objectives without the investment of money, time, and resources—precisely the things that are in such short supply.

Most RIFs will be effective only if there is adequate management planning. Here are some suggestions:

Organizational Goals. Evaluate and establish organizational goals and concrete objectives—for example, by answering the following questions:

- Is the RIF necessary to reduce costs, increase productivity or efficiency, or address other financial/operational metrics?
- What organizational changes are required or desired?
- Is it necessary to change or adjust employee skill sets?
- What facilities, departments, or functions will be affected?
- Is a pure headcount reduction warranted with no structural or organizational changes?

RIF Management Team. Identify key management personnel to formulate RIF procedure/criteria and to manage the RIF, including:

- Key business executives from affected businesses
- Human resources and benefits representatives
- Communications and media relations professionals
- Legal counsel

RIF Alternatives. Consider alternatives to involuntary employment terminations, which include:

- Hours reductions and work-sharing arrangements
- Overtime restrictions
- Hiring freezes and reliance on attrition to reduce headcount
- Elimination of contract employees, temps, consultants, and/or other “contingent” service providers

- Voluntary unpaid leave programs or short-term shutdowns
- Exit incentive or other voluntary separation programs

Type of RIF. Evaluate and resolve questions concerning the type of RIF that will best achieve forward-looking business needs and objectives and all other RIF issues:

- Determine the type of RIF that is appropriate or necessary (headcount reduction, organizational restructuring, outsourcing, etc.)
- Establish the criteria and process by which employees will be recommended or selected for potential separation

RIF Procedure. A written RIF procedure should indicate the following:

- What process will be followed for the RIF (see “[Sample RIF Procedure.](#)”)
- What criteria should govern all separation and retention decisions, and who will make or approve all decisions
- Which company representatives (at least two) should be involved in all exit interviews, recommendations, and decisions
- What role (if any) should be played by existing performance evaluations, current or past discipline, etc.
- What documentation should be completed, when, and by whom
- What type of higher-level management review will be conducted of RIF selection recommendations (including consultation with counsel, and an adverse impact analysis, among other things)
- What disclaimers pertain to the RIF (e.g., all decisions must be based on the designated business criteria; no decisions may be based on age, sex, color, or other protected characteristics, and so on)

RIF Benefits Issues. All workforce reductions implicate a significant number of benefits issues, many of which warrant attention and the potential creation, amendment, or termination of preexisting benefit plans prior to the RIF’s implementation. (See “[RIF Benefits Planning.](#)”)

RIF Benefits Planning

A RIF or other workforce restructuring may have a significant impact on a company's employee benefit plans. Following are some of the most important employee benefits issues to consider when implementing a RIF:

Severance Benefits. One of the key decisions a company must make is whether to provide severance benefits to employees terminated in a RIF. In making this decision, employers must balance the benefits of providing severance to terminated employees:

- Easing the transition for displaced workers
- Severance serving as consideration for a release and waiver of claims against the company
- The positive impact that providing severance may have on the morale of retained employees (i.e., retained employees will see that the company treated terminated employees in a favorable fashion)

Against the costs of providing severance:

- The out-of-pocket financial costs of providing severance
- The administrative burden of providing severance benefits and maintaining severance plans
- The possibility of compliance issues and liabilities arising out of the severance arrangements

Once a company makes a decision about severance, it may be necessary to take action to amend or terminate existing severance arrangements or establish new severance arrangements. The last issue discusses severance arrangements in more detail.

Retention Arrangements. Sometimes lost in the context of a RIF is the impact the RIF has on employees who continue to be employed by the company after the RIF is implemented. A company's ability to survive and prosper following a RIF depends in no small part on whether the retained workforce is motivated and engaged in the company's continued survival and success.

As noted above, providing severance benefits to terminated employees may have some degree of positive impact on the retained workforce. But companies should consider whether revisions to existing benefit plans (particularly, bonus and incentive arrangements) or the establishment of new plans is necessary to retain and motivate current employees.

Other Company Benefit Plans. Companies should methodically review and assess the impact of the RIF on each and every employee benefit plan. This will aid in assessing the impact of the RIF on the benefit plans and in identifying any hidden liabilities that may result from the RIF. For example:

- **Tax-Qualified Retirement Plans**—A RIF involving a large number of employees who participate in a tax-qualified retirement plan may constitute a “partial termination” for

purposes of the plan and require such employees to be fully vested in their plan benefits. Depending upon the terms of the plan, employees may qualify for special benefits (e.g., so-called “plant shutdown” benefits or special service enhancements in a pension plan).

- **Health Plans**—Employees participating in a health plan (a plan providing medical, dental, vision, or other health-care benefits) will have COBRA continuation coverage rights upon termination. Also, see the next section for more on the recently established COBRA subsidy.
- **Bonus or Incentive Arrangements**—Employees who are terminated during the middle of a performance period may be entitled to a pro-rata payment under a bonus/incentive plan.
- **Leave Arrangements**—Terminated employees may be eligible to receive a payout of accrued vacation, sick leave, or other paid time off.

COBRA Subsidy. The recent stimulus legislation (the American Recovery and Reinvestment Act of 2009) substantially revised the COBRA rules to provide a subsidy for COBRA continuation coverage. In general:

- Employees who are involuntarily terminated between September 1, 2008 and December 31, 2009 (and possibly their spouses and other dependents) and who pay 35% of the cost of the COBRA coverage are eligible to receive this subsidized COBRA coverage for up to nine months. Companies providing the subsidized COBRA coverage can recoup the 65% balance of the cost from the government by taking a credit against applicable withholding and payroll taxes.
- This subsidized COBRA coverage is available for coverage periods beginning on or after March 1, 2009 and companies must satisfy enhanced notice obligations to communicate the availability of the subsidy to affected individuals.
- Complicated coordination issues may exist for companies who already provide subsidized coverage for terminated employees (e.g., a company who provides coverage at “active employee rates” during the period severance is being paid). These companies may need to adjust their benefit plans in order to recoup the maximum available subsidy from the government.

A more detailed description of these COBRA subsidy rules is set forth in these recent LawFlashes from [March](#) and [April](#).

Sample RIF Procedure

[back to article ▶](#)

RIF Planning

Develop RIF process, criteria, severance and other benefits, documentation, waivers/releases, and communications. Evaluate potential WARN (and state law) notice obligations, union bargaining obligations, and any desired benefit plan changes or amendments



RIF Procedure (written)

Describe process, criteria, decisionmakers, instructions, and disclaimers



Management Communications & Training

Develop RIF process, criteria, severance and other
Explain RIF procedure, criteria, objectives, reasons for RIF, and prohibitions against discrimination



Employee/Public Communications (optional)

See "Employee/Public Communications" box. Communications are required at this stage as part of any voluntary exit incentive program



Voluntary Exit Incentives (optional)

Can generally be limited to particular groups or facilities, or to applicants subject to management review



Tentative RIF Selections

Supervisors or others make recommendations using criteria, and prepare RIF documentation



(next column)

Higher-Level Management Review

Review recommendations and adequacy of documentation, ensure proper application of criteria, consult with counsel, and consider adverse impact analysis (preferably privileged); possible back-and-forth discussion with supervisors



Finalize RIF Selections and Documentation

Complete selections, written explanations, and other documentation, identifying all decisionmakers and reviewers for each RIF selection



Employee/Public Communications

Issue employee announcement letters and conduct meetings/exit interviews; issue follow-up Q&As, benefits information and COBRA notices, waivers/releases and mandatory OWBPA disclosures, and WARN notices (if required)



Post-Announcement Implementation

Collect signed waivers/releases (usually no sooner than last day worked); address benefits issues and any ongoing work performed through separation dates; monitor WARN notice separation dates



Union Issues and Bargaining—IMPORTANT

In unionized work settings, decision- and effects-bargaining must take place concerning many types of RIFs—for example, certain relocations, outsourcing, closings, or layoffs—with management not being permitted to make *any* final decisions until after unions have the opportunity to bargain