

Morgan Lewis

WORKFORCE CHANGE IN THE AUTO INDUSTRY

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**Michael Schlemmer
Douglas Schwarz**

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Morgan Lewis Automotive Hour Webinar Series

Series of automotive industry focused webinars led by members of the Morgan Lewis global automotive team. The 10-part 2019 program is designed to provide a comprehensive overview on a variety of topics related to clients in the automotive industry. Upcoming sessions:

NOVEMBER 13 | Joint Ventures and Alliance Issues in the Automotive Space

DECEMBER 11 | Privacy Considerations and the Use of Collected Data

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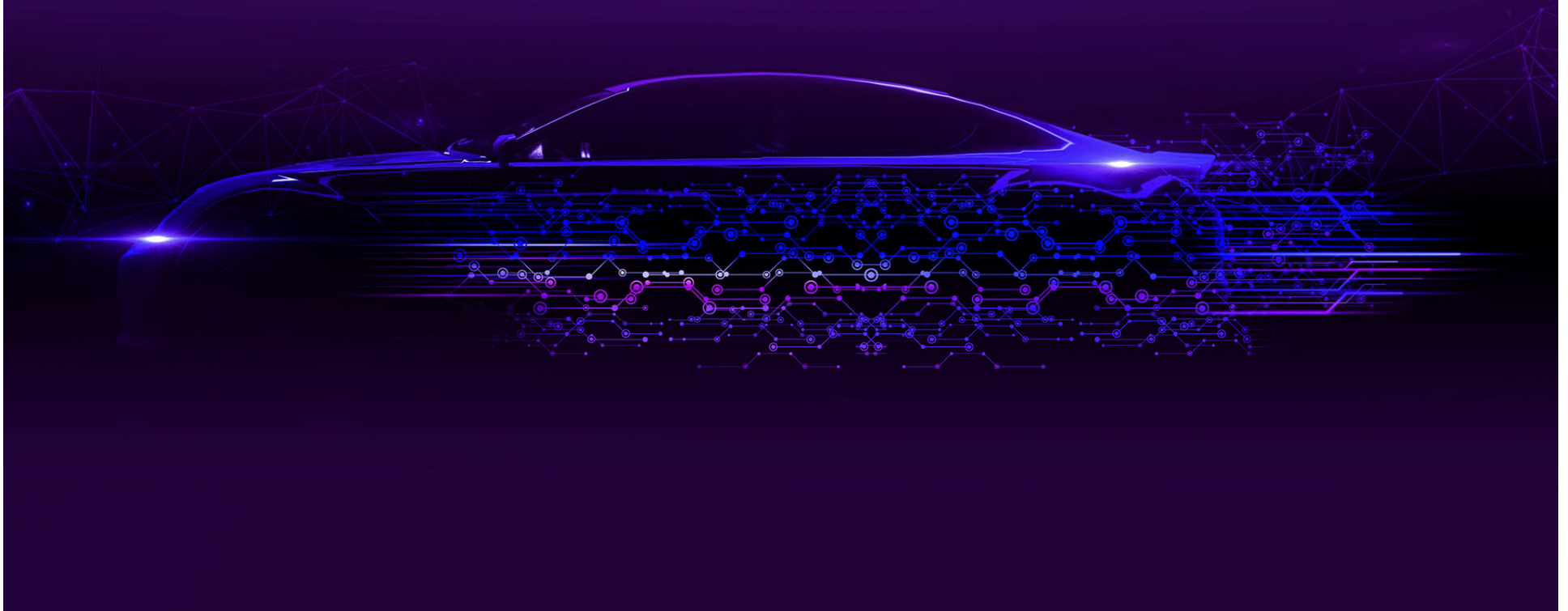
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SECTION 01

INTRODUCTIONS



Today's Presenters



Michael D. Schlemmer
Silicon Valley
Tel +1.650.843.7538
michael.schlemmer@morganlewis.com



Douglas T. Schwarz
New York
Tel +1.212.309.6890
douglas.schwarz@morganlewis.com

SECTION 02

ASSESSING AND ADDRESSING THE USE OF NON-EMPLOYEE WORKERS



What/Who are Non-Employee Workers?

- “Consultants”
- “Temps”
- “Contractors”
- “Independent Contractors”
- “Staffing Company Employees”

So What's the Problem?

Excessive use of non-employee workers leads to lots of workers the law views as employees who:

- have no company HR/compliance oversight; and
- are treated differently – usually less well – than others who do the same jobs but are employees

This situation creates all sorts of legal and HR risks

What are the Legal and HR Risks Associated with Excessive Use of Non-Employee Workers?

- **Legal:** misclassification problems (e.g., “ABC” Test); joint employer liability for numerous types of claims, including wage and hour, discrimination and harassment; ERISA non-discrimination testing employee-counting problems; Affordable Care Act problems; other tax issues; workers’ compensation issues; etc.
- **HR:** Among the non-employee workforce: bad morale, discouragement, lack of commitment, ripe for organizing

What Causes the Problem of Overuse of Non-Employee Workers?

- Pressure to limit headcount but get work done;
- Insufficient communication between purchasing, legal, and HR functions;
- Lack of appreciation of the risk.

But Wait, Aren't there a lot of Benefits?

Potentially. If implemented properly, a program of selective use of non-employee workers can avoid creating problems and actually solve some.

- Get to know worker before hiring?
 - Yes. Temp-to-hire aspect is a plus on both sides.
- Less expensive?
 - Appears to be so, but there is a markup to the staffing company, and one joint employer lawsuit and any savings can be quickly consumed

Benefits of Non-Employee Workers, Cont'd

- Less administrative headache?
 - Appears to be easier on/easier off, but company can end up liable for the staffing company's or independent contractor's administrative mistakes
- Buffer for downturns?
 - Enables companies to avoid laying off employees

What are Potential Solutions/Best Practices to Avoid Problems of Overuse of Non-Employee Workers?

- Carefully monitor and strictly limit the number of non-employee workers
- Regular insourcing – temp-to-hire
- Clear policies and guidelines on when and how company can use non-employee workers
- Regular training for managers on when and how to use non-employee workers

Potential Solutions/Best Practices, Cont'd

- Better auditing and policing of use of non-employee workers in compliance with policies and guidelines
- Better vendor selection – strong balance sheet; strong internal HR
- Better agreements with vendors (addressing various potential pitfalls, including strong indemnification clause)
- Development of alternatives to non-employee workers, including short-term employment and retiree rehire

SECTION 03

REDUCTIONS IN FORCE



General Business Considerations

- Business reasons for a RIF
 - Reduce staffing/costs
 - Better align resources
- Retain skills and abilities to fulfill future business needs
 - Ensure that the Company is reducing the right employees
 - Right people in the right jobs going forward
 - Ensure staffing reduced in appropriate areas
 - Consider the effect the RIF will have on business and operations

Legal Considerations

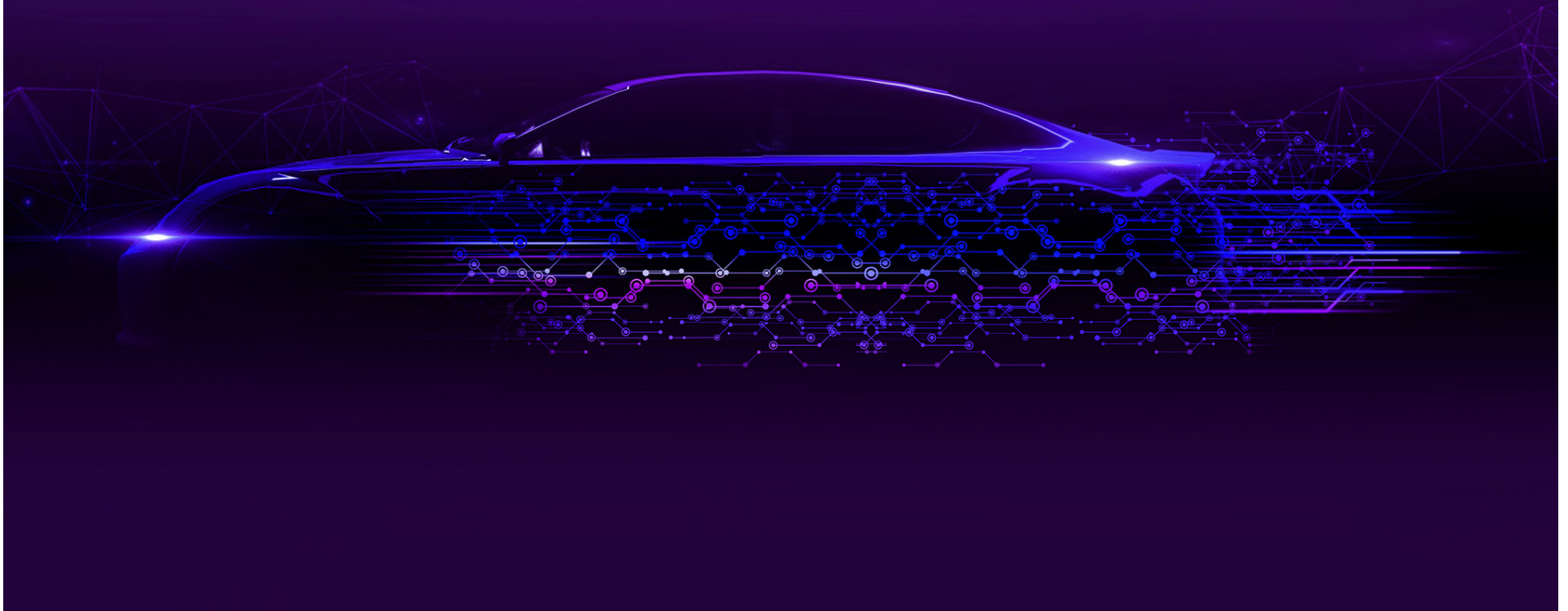
- Minimize the potential for litigation and litigation-related costs
- Fairness to employees
 - Fair process, fairly applied
 - Effective communications
 - Morale of remaining employees
- Perception of general public and customer relations

Top Ten RIF Mistakes

1. Too fast: improper pre-RIF planning; not considering business objectives and possible alternatives
2. Too slow: multiple rounds of reductions, business paralysis, and “the retained employees are leaving” problems
3. No process, no criteria, no control, no documentation, and (later) no witnesses who can remember anything or anybody
4. Deficient HR/Legal review of preliminary RIF selections
5. Deficient (or no) statistical analysis of RIF selections
6. Failure to address severance pay plans and policies
7. Failure to adequately address union/contract claims
8. Deficient waivers/releases
9. Inadequate and ineffective (or worse) communications
10. Failure to comply with WARN/state law notices

SECTION 04

RIF ALTERNATIVES



Depending on Business Drivers, Consider Alternatives

- Consider several RIF alternatives
 - Eliminate contract employees, temps, or other “contingent” workers
 - Temporary shutdowns (full week shutdowns for exempt employees)
 - Pay reduction
 - Hours reduction for non-exempt employees (problem for exempt employees in some states)
 - Vacation accrual reduction
 - Spin-off of discrete business units
 - Reorgs/allowing employees to move between roles/departments
 - Hiring freeze and attrition
 - Voluntary exit incentive programs
- Ensure alternatives are administered in legally compliant manner
 - Ensure salary thresholds maintained for exempt employees (and minimum wage for non-exempt employees)
 - Deferred wages not permissible in all states

Voluntary Exit Incentive Programs

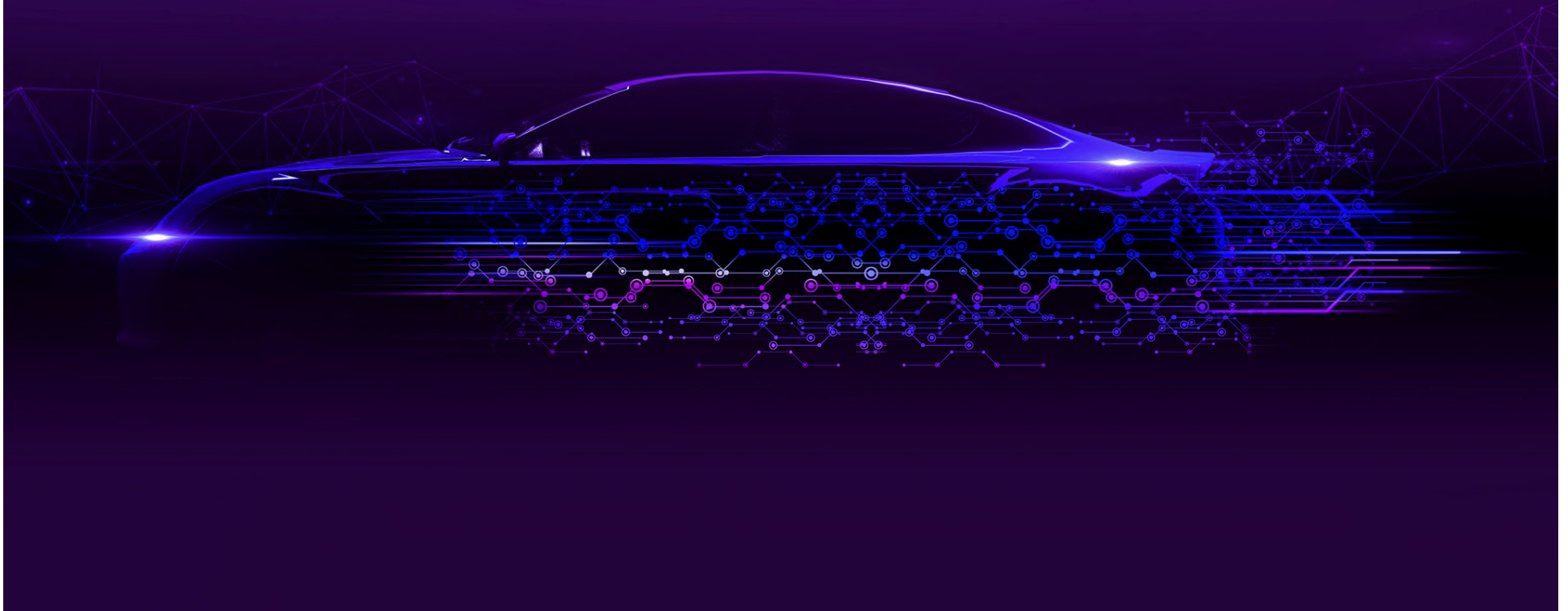
- Structure
 - Richer benefit offered to eligible group as a *one-time* opportunity.
 - Employees volunteer by submitting application during an announced “window period.”
 - Employer can reject applicants (*e.g.* in the case of over-subscription against business needs)
 - Benefits are not paid until severance and release agreement is signed.
- Advantages:
 - Reduces risk of EEO discrimination claims
 - Especially important where targeted workforce consists of disproportionately protected class
 - Likely less damaging to employee morale
 - Can be presented in a pro-employee positive light
 - Can be paired with subsequent involuntary RIF

Voluntary Exit Incentive Programs

- Disadvantages:
 - Potentially more difficult to target terminations with precision
 - Often must offer greater inducement
 - Cost uncertainty (but can put caps on numbers approved)
 - Potential for oversubscription (may be alleviated through careful design and implementation of eligibility rules)
 - Greater potential for ERISA fiduciary breach claims by employees who voluntarily resign/retire prior to program
 - May take longer periods to implement

SECTION 05

RIF PLANNING



RIF Planning

- Clearly and accurately articulate business goals/objectives
- Review existing severance plans (ERISA compliance)
 - Consider adopting new ERISA compliant severance plans
- Consider contract claims (severance/notice rights)
- Review policies and past practices regarding layoffs, severance rights, notice rights
- Consider any CBA obligations
- WARN Act compliance
- Carefully review process and preliminary selection results with Legal to minimize discrimination claims

RIFs – Union Issues

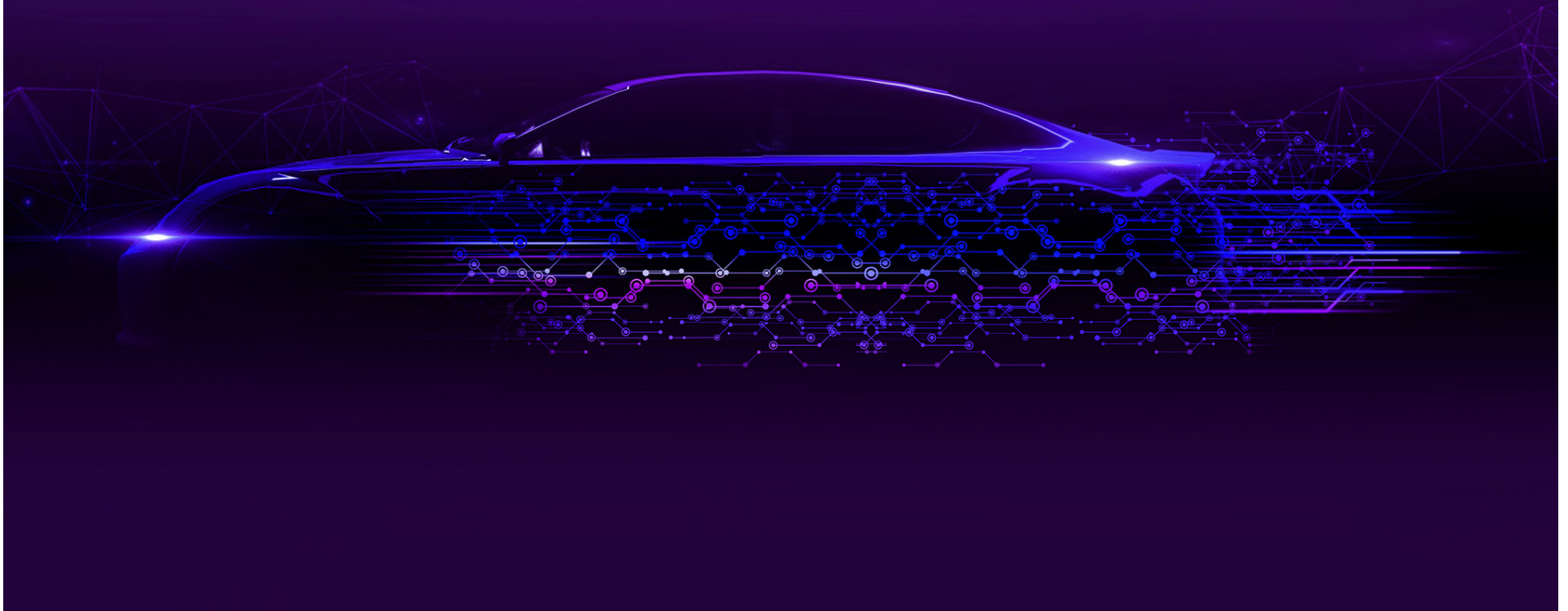
- If your company has unionized employees who may be part of the RIF, there are certain additional considerations, including:
- Is there a decision bargaining obligation?
 - Unless the CBA gives the employer the right to unilaterally lay off employees, there may be an obligation to bargain with a union over the decision to lay off, and whether there are any alternatives to a lay off
- Effects bargaining/Severance
 - Even if there is no obligation to bargain over the decision to implement layoffs, there likely will be an obligation to bargain over the effects of the layoff, and/or a provision in the CBA that requires certain severance in the event of a layoff

ERISA Compliant Severance Plans

- Advantages of an ERISA plan:
 - Preemption of state law claims, including reverse discrimination claims and claims for punitive damages
 - A deferential standard of review in any litigation challenging benefit claim determinations
 - Trial before a judge rather than a jury, and in federal rather than state court
- Disadvantages of an ERISA plan:
 - Participation, vesting, funding, fiduciary responsibility, tax qualification, reporting and disclosure requirements applicable to pension benefit plans and the potential penalties and liabilities associated with noncompliance with such requirements

SECTION 06

POTENTIAL LEGAL CHALLENGES



Potential Claims

- Class – age, gender, race, benefits
 - Discriminatory criteria
 - Disparate impact
 - Subjectivity
- Individual – all applicable discrimination, retaliation, tort and contract claims
 - Position elimination – position not eliminated
 - Selected based on qualifications – employee more qualified than those retained
 - Consistency in message/communication regarding reasons for RIF and selection criteria (from perspective of impacted employee – whether they agree they are the “right person” for selection)
 - Failure to follow RIF policies
 - Different criteria used for different groups

Factors that Increase Risk

- Factors that increase risks:
 - Disparate impact – statistics
 - Treatment of comparators
 - Stray remarks
 - Exceptions to process
 - Length of employment
 - Identity of decision-maker
 - Knowledge of characteristic or conduct
 - Replacement has same characteristic

Factors that Reduce Risk

- Factors that reduce risk:
 - Consistency (clear justification for exceptions)
 - Objectivity
 - Truth/accuracy
 - Clearly documented rationale
 - Objective selection criteria and process
 - Statistical review and validation
 - Communications; dignity in process
 - Fairness (in selection; severance opportunity)
 - Releases (to the extent valid and enforceable)

Burden of Proof – Disparate Treatment

- Disparate Treatment: intentional discrimination
- Burden of Proof:
 - Prima Facie case:
 - Protected class
 - Qualified for job
 - Terminated
 - Evidence of discrimination
 - Legitimate Non-Discriminatory Reason
 - Justification for the RIF
 - Justification for the individual selection
 - Pretext
 - Statistics
 - Comparison to others

Burden of Proof – Disparate Impact

- Disparate Impact: policies, practices, rules or other systems that appear to be neutral result in a *disproportionate impact* on a protected group
- Burden of Proof:
 - Prima Facie Case
 - Business Necessity (disparate impact applies under Title VII if challenged practices were not job-related *and* consistent with business necessity)
 - Company should have clear documentation of its business purpose
 - Selection criteria should align with stated objectives

SECTION 07

SELECTION PROCESS



RIF Selection Process

- Identify decision makers
 - Who will be selecting employees for layoff
 - Consider optics and ability to defend posture in litigation
 - Consider using selection committee (including management, HR, Legal, PR reps)
- Consider which types of positions or work units will no longer be necessary in light of the stated business goal
 - Business objective/goal should be sole driver for selection process
 - Define “scope” of reduction (decisional unit): consider whether RIF will be based on geographic considerations, functional roles, management heads, job titles, etc.
 - Determine selection criteria: Consider whether selection will be based on technical skills/competencies, experience, performance, or some other legitimate business factor
- Consider which positions and skills must be retained to achieve the stated business goal (including projected post-layoff staffing needs)

Selection Method

- The development and recordation of a valid selection process is critical to the Company's ability to defend against discrimination claims.
- Possible all positions being eliminated, based on role/geography/etc. (simpler to defend legally)
- Otherwise, if only a portion of employees within an affected group will be selected, then carefully consider selection methodology
 - Ideally based on objective criteria
 - Decision makers should be able to explain the basis for any subjective judgment.
 - Appropriate criteria may include knowledge, skills, abilities, seniority, or past performance.
 - If performance is a factor, consider reliability of existing performance indicators (past performance evaluations, past bonus achievements, potential disciplinary or performance-related documentation)
 - It may also include discernable qualities and competencies that can be explained and supported with examples or other identifiable observations.
 - Selection criteria should provide sufficient flexibility so that the most productive employees are retained, but generally should not use the selection process as a means of addressing individual performance issues. The key should be the employee's "suitability" to the needs of the stated business goals.

Position Elimination

- All persons in job are selected for RIF
 - Positions do not properly align with existing or future business plans.
 - Positions are redundant or functions are unnecessary.
 - Layers of management can be eliminated without a disruption to business.
- Relative performance not considered – all within position impacted
- Once the decision to eliminate a position or group of positions within an organization or department is made, it is generally permanent.
 - Job duties will be redistributed among existing employees in other positions.
 - Replacement of such positions should generally not occur for at least 6 months, absent a strong business case reflecting a change in needs that was unanticipated at time of RIF.

Position Consolidation

- Number of employees within title/role/function reduced – some selected for retention, some for layoff.
 - Employees doing similar work rated together, based on relative performance and/or skill set.
- **Performance based:**
 - Identify employees in affected business unit with same or similar job titles/functions.
 - Apply consistent/objective criteria to assess performance based on essential duties and responsibilities of position.
 - Preliminarily select lowest performers within scope.
 - Confirm decisions are consistent with most recent performance evaluation.
 - Deviations from existing performance evaluations should be clearly explained in pre-RIF documentation.
- **Skills based:**
 - Identify primary skills expected for role in continuing business
 - Preliminarily select employees for RIF based on skill set.
 - Consider transferable skills.
 - Confirm assessment is consistent with existing documentation (prior reviews, resume, etc.)

Performance-Based Selections

- Some RIFs may be made based solely on an employees' performance records, apart from position eliminations or function consolidations.
 - Review existing performance evaluations or other performance-related documentation (*e.g.*, disciplinary history, bonus history, commendations/awards).
 - Review both "overall ratings" and any written narrative to evaluate whether there is support for the performance distinctions for the selection decision.
 - Consider whether performance deficiencies have been addressed with employee.

Performance-Based Criteria

- Examples of performance criteria may include:
 - productivity/work ethic/dependability
 - substantive knowledge base in respective area, including command of current and relevant processes and applications associated with job function
 - responsibility and initiative with respect to job functions
 - written and verbal communication skills
 - adherence to applicable policies and procedures
 - client service oriented
 - strong leadership/management skills
- Avoid subjective reasons (*e.g.* attitude, energy, commitment, or “team player”)

Documenting the Selection

- Develop consistently applied method of documenting the selection process.
 - Preferably a standard listing of skills, categories, and criteria that can be checked off and rated easily.
 - Individual comments are sometimes necessary for further explanation.
- Maintain clarity that no selections are considered complete until preliminary selections have been reviewed and approved by Legal

Legal Review and Privilege

- Decision makers should preliminarily select employees for RIF, and provide selections to HR and Legal for review
 - HR and/or Legal to ensure consistency with RIF selection process
 - HR and/or Legal to address potential sensitive issues associated with particular selections
 - Legal to ensure adverse impact review
 - **Decision makers should not engage in any communications that suggest decisions are final until Legal and HR have completed their review**
- Maintain strict confidentiality and attorney-client privilege throughout process
 - Maintain counsel involvement and mark communications as “Privileged and Confidential”
 - Limit selection information and RIF preliminary decisions to need-to-know group
 - Minimize email exchanges

Adverse Impact Analysis

- Allows the Company to statistically analyze the impact of the RIF with respect to age, gender, and race.
 - Compares preliminary selection data against baseline employee data within decisional unit
 - This must occur before any selections are finalized
 - Depending on the outcome of this analysis, the Company may want to re-check the quality of the RIF selections against stated criteria
 - Must be wary of artificial changes that can trigger “reverse discrimination” claims
- Must be done by, or at the direction of, legal counsel
 - Critical to maintain privilege over report
 - Mark all related communications “Attorney-Client Privileged and Confidential”

Special Considerations

- Is a member of a protected class, where selections reflect adverse impact
- Is on, or recently returned from, a leave of absence (FMLA or otherwise, including intermittent absences)
- Has a disability
- Is pregnant
- Is within 6 months of vesting for a significant benefit event
- Has complained of discrimination, sexual harassment or another form of harassment
- Has complained about activity protected by a whistleblower statute
- Has pending or previous employment-related litigation, charges, or complaints against the Company, including but not limited to employees who have threatened to file a charge or complaint
- Has an individual employment contract with the Company or has been made any oral and/or written promises by the Company
- Has any confidentiality, trade secret, non-compete, and/or non-solicitation agreements with the Company
- Has or may have a litigation support role in any ongoing or threatened litigation which might require future cooperation

SECTION 08

EMPLOYEE NOTIFICATIONS



WARN Act Compliance

- If triggered, this implicates required notice periods (and/or pay in lieu thereof)
 - If WARN triggers, carefully consider timing and content of employee notices
 - Generally 60 days advance notice and/or pay/benefits in lieu thereof to affected employees
 - Must also give notice to local and state governments, union officials
- Applies various triggers, primarily including:
 - Plant closure (shutdown of a single site, facility, or operating unit) that results in employment loss for 50 or more (excluding part-time employees)
 - Mass layoff (employment loss of 50 or more employees constituting at least 33% of employees at a single site (excluding part-time employees), *or* 500 employees at a single site (regardless of percentage)
 - Rolling 90-day period within which triggering events are presumed to aggregate
 - Consider statutory exceptions
 - Consider whether there may be viable alternatives that avoid WARN triggers
- Be mindful of state and local “mini-WARN” obligations

General Employee Notifications

- Communication plan
 - Treat employees fairly, consistently, and with dignity
 - Where will termination meetings take place?
 - Allowed to return to worksite to retrieve belongings?
 - Consider privacy, safety, restrictions from Company property.
 - Consider approach to multiple geographies/shifts
 - Who will be present?
 - Town Hall approach, Departmental, Individual?
 - Possible to handle all in person? What about remote employees?
 - When will notification meetings happen?
 - Possible to all occur in one day to minimize general panic and disruption?
 - Consider how to notify employees on vacation/leave
 - Be prepared for negative reaction (*Why me? Who else? Why now? Can I appeal? I am getting a lawyer..*)
- Be sure to consider communication strategy with *retained employees* too!
 - What happened; how it impacts them (or not); changes in reporting structure; value of their continued contributions

FAQs

- Advance preparation of FAQs
 - Be prepared to address selection process at a high level
 - Severance options/requirements
 - Outplacement services?
 - Benefits impact?
 - Eligible to apply for other roles?
 - Eligible for future rehire?
- Advance preparation of termination script and personal notices

Logistics

- Final Pay
 - Payout of accrued but unused vacation
 - Payout of incentives (commission, earned bonuses)
- Benefits notices
 - Benefits continuation (COBRA)
- Consider whether certain employees may be critical for short-term transition period
 - Utilize higher severance, retention agreement/milestones arrangements as appropriate
- Be prepared for the unexpected
 - 11th hour harassment complaints or disability notice; employees who refuse to leave; employees who engage in theft or damage to property; social media and blog postings
- Hiring freeze following RIF?

Protecting Information and Equipment

- Identify which employees have access to confidential information and where it is stored
- Monitor access and use of confidential information to prevent misappropriation
- Consider confidentiality clauses in releases or restrictive covenants (where permitted)
- Insert representations in agreements regarding confidential and proprietary information, trade secrets, irreparable harm, etc.
- Trust but verify: consider audits or interviews of departing employees, and conduct electronic scans of laptops or portable storage devices
- Curtail computer and systems/network access to departing employees
- Limit general access to physical property or equipment that might be subject to theft or damage

Workplace Safety

- While cases of workplace violence following a RIF are rare, Companies should be prepared.
- Consider retaining security and/or notifying local law enforcement of the upcoming layoff.
- Consider the time and location of employee notifications, with an eye towards potential reaction.

SEC Reporting

- If Company is subject to SEC reporting requirements, and in connection with the RIF the Company will incur material charges under Generally Accepted Accounting Principles (GAAP), the company is required to disclose that fact on Form 8-K.
 - Also consider layoffs of key executives and termination of material agreements.
- The filing must generally be made within four days of the triggering event.

SECTION 09

SEPARATION AGREEMENT



Separation Agreement

OWBPA Requirements for employees 40 and older:

- Cannot waive ADEA (*e.g.* federal age discrimination) rights unless waiver is “knowing and voluntary”
- Requirements for ADEA waivers to be knowing and voluntary . . .
 1. Understandability – “written in a manner calculated to be understood by [the] individual, or by the average individual eligible to participate”
 2. Mention ADEA – “refers to rights or claims arising under [the ADEA]”
 3. No Future Waiver – no waiver of rights/claims “that may arise after the date the waiver is executed”
 4. Real Consideration – “only in exchange for consideration in addition to anything of value to which the individual already is entitled”
 5. Consult a Lawyer – individual “is advised in writing to consult with an attorney prior to executing the agreement” (we favor a separate “writing”)
 6. Review Period – individual “is given a period of at least 21 days within which to consider the agreement” –
45 days to review for group layoff
 7. Revocation Period and When Effective – agreement provides for revocation period of at least “7 days following . . . execution” AND provides “the agreement shall not become effective or enforceable until the revocation period has expired”

Decisional Unit

- Scope of individuals considered for RIF (even if ultimately not selected)
 - decisional unit must be described in disclosures (*i.e.*, the “class, unit, or group of individuals covered by [the] program”)
 - defines who must get disclosures (*i.e.*, “each person in the decisional unit who is asked to sign a waiver agreement”)
 - defines scope of age/position data that must be disclosed
- If decisional unit is not accurately defined, then the ADEA release may be subject to challenge
 - Often tied to specified facility (place, location, physical plant, complex)
 - May comprise several facilities
 - If reduction is considered across multiple facilities, then the decisional unit might similarly span all considered facilities.
 - Can also be a sub-group of the workforce (*e.g.* particular division, function, job title)
 - Might be defined by elimination (*e.g.* “all non-managerial employees in X facility, with the exception of ABC”).

Decisional Unit Exhibits

- When waiver requested “in connection with an exit incentive or other employment termination program offered to a group or class of employees”
 - OWBPA regs: “program” defined as when employers “offers additional consideration ... to **two or more** employees”
- What disclosures are required?
 - Inform employees “in writing” and in a “manner calculated to be understood by the average individual eligible to participate” as to:
 - (a) any class, unit, or group of individuals covered by such program
 - (b) any eligibility factors for such program
 - (c) any time limits applicable to such program
 - (d) the job titles and ages of all individuals eligible or selected for the program; and
 - (e) ages of all individuals in decisional unit who are not eligible or selected for the program

Tracking Responses

- Track severance agreements responses;
- Send employee reminders when appropriate (*e.g.* deadline approaching)
- Coordinate with Payroll to ensure severance payments and benefits are timely issued
- Coordinate with Legal to address any negative employee responses, PR/media/social media issues, or potential claims/demands

QUESTIONS?



THANK YOU

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