

Morgan Lewis  
Workforce Change

informative™

*Testing the Fundamentals  
Managing Workforce Reductions  
in Difficult Times*

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February 17, 2009

# Difficult Times . . . Perspective and Priorities

Lots of company . . .

## **The New York Times**

Monday, January 26, 2009

### **Layoffs Spread to More Sectors of the Economy**

By CATHERINE RAMPELL  
Published: January 26, 2009

Furloughs, wage reductions, hiring freezes and shorter hours simply did not do enough. A year into this recession, companies across the board are resorting to mass job cuts.

# Difficult Times . . . Perspective and Priorities

Lots of company . . .

Times do change (“what goes down must come up”) (?)

You can’t do everything – focus on the most important things

- Dollars and claimants – you can’t count that high
  - *especially relevant in workforce reductions*
  - *policies and practices apply to many employees as a group*
  - *easier class action and collective action lawsuits*
- Organizational humiliation (“We did what?”)
- Prevention possible, cheap or easy – “it could have been done differently”
- Visibility, publicity and penalties – the wrong kind . . .
  - *“CEO gets blindsided” problem*
  - *“Stock price hit” problem*
  - *“Congressional subpoena” problem*

# Restructuring Decisions

## Avoiding the Legal Pitfalls – Framework

- 1 **RIF Claim Avoidance: Working Backwards**
- 2 **Performance Management and RIFs**
- 3 **Voluntary Separation Programs**
- 4 **Severance Pay and Benefits Issues**
- 5 **Waiver/Release Compliance**
- 6 **WARN and state notification laws**
- 7 **RIF and Restructuring Resources**

# 1 RIF Issues – Working Backwards

**Involuntary termination** occurs . . .

- (1) Employee is told of termination
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Voluntary departure (not involuntary)

Sued for not letting some people “volunteer”

**Charge/lawsuit** filed

**Disparate Treatment case**

- (1) prima facie case of discrimination
- (2) employer legitimate non-discriminatory reason
- (3) employee tries to prove “pretext”

**Disparate Impact case**

- (1) policy or practice causes disparate impact
- (2) challenged practice or policy based on . . .
  - (i) reasonable factor other than age (ADEA) or
  - (ii) business necessity (Title VII)

**Damages**

ADEA cases: “willful” violation (knowing or reckless disregard of ADEA violation)

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Process; Scope; Criteria; Severance Benefits;  
Documentation; Waivers; Communications/PR etc.

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## RIF Planning



**RIF Procedure (written):** think “Exhibit A”

- (1) What process?
- (2) What criteria?
- (3) Who makes decision?
- (4) **Existing performance evaluations**
  - Which ones considered (if any)?
  - Limited role (if any): backward, not forward
- (5) New documentation and/or evaluations/narratives
- (6) Higher level review (and adverse impact analysis)
- (7) **Disclaimers**
  - All decisions to be made based on stated criteria
  - No decisions influenced by age, sex, race, etc.
  - Limited role played by performance evaluations

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**Mgmt Communications/Training**

- (1) Explain RIF Procedure (criteria, process, role played by documentation, disclaimers)
- (2) Explain organizational objectives
- (3) **Address supervisor fears/concerns (possible retention agmts, severance issues, etc.)**
- (4) Explain reasons for reduction
- (5) Watch: role of attorneys and “privilege waivers”
- (6) **Retain “Mgmt Training” Docs: think “Exhibit A”**
- (7) Remember “Murphy’s Law” (think “idiot-proof”)

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Mgmt Communications/Training



**Employee/Public Communications:** think “Exhibit A”

(1) Employee announcement letter (meetings)

(2) **Questions & answers (WATCH: discoverable)**

(3) Benefits information

(4) NOTE: frequently later (after RIF selections made)

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Employee/Public Communications: think “Exhibit A”



Volunteers (optional)

- (1) Possible limitations by position, department, etc.
- (2) **Possible two-stage process** (volunteers “apply”)
- (3) **Disclaimers:**
  - participation subject to mgmt discretion,
  - no stmts re other or different future packages,
  - participation is voluntary,
  - involuntary RIFs possible later (optional)

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Volunteers (optional)



**Tentative Selections:**

- (1) **Prevent access to “protected” data**
- (2) Make tentative selections
- (3) Prepare documentation, explanations, etc.

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**Tentative Selections**

**Higher Level Mgmt Review**

- (1) Review narratives/explanations for concrete reasons; “evaluation” issues; differentiation from comparison employees; smoking gun/code words
- (2) Ensure fidelity to process and criteria
- (3) Sanity check re “criteria applied in practice”
- (4) Sanity check re number of reductions
- (5) **Legal consultation; adverse impact analysis**
- (6) **Possible back-and-forth with lower mgmt re:**
  - completeness/adequacy of documentation
  - individual selections
  - potential changes based on numerical disparities
- (7) **WATCH:** reverse discrim, “reason” for changed selections, and “supervisor backlash” testimony

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**Mgmt Communications/Training**

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Employee/Public Communications: think “Exhibit A”

- (1) Employee announcement letter (meetings)
- (2) **Exit interviews (2 mgrs; be prepared: “why me”)**
- (3) Questions & answers
- (4) Benefits information and COBRA notices
- (5) Waivers/releases and OWBPA disclosures
- (6) WARN notices (if required)
- (7) **Don’t forget to focus on people being retained**

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- nobody remembers claimant,
- different reasons given at different times
- different criteria applied by different people

Decision-maker: “not my decision”

Decision-maker: “performance not relevant”

Performance evaluation problems . . .

- claimant’s performance evaluations good,
- retained employees’ evaluations bad,
- no performance evaluations at all.

Performance evaluations support reasons

New evaluation system created just for RIF

Objective criteria used (e.g., seniority)

Smoking gun (direct evidence) problems . . .

- “too old to do the job,”
- “retirement home image,”
- “age is a stigma we all carry around.”

Terrible statistics – overall or particular groups

(older employees gone, younger employees kept, average age decrease, over/under 40 analysis, etc.)

Pre-RIF training or lack of pre-RIF training

Meaningful higher-level management review

Valid employee waiver of legal claims/damages

**RIF Planning**

**RIF Procedure** (written): think “Exhibit A”

**Mgmt Communications/Training**

**Employee/Public Communications:** think “Exhibit A”

**Volunteers** (optional)

**Tentative Selections**

**Higher Level Mgmt Review**

**Finalize Selections-Documentation:** think “Exhibit A”

**Employee/Public Communications:** think “Exhibit A”

**Post-Announcement Implementation**

- (1) **Collect release/waiver agmts (last day wk?)**
- (2) Benefits/severance administration
- (3) Continuation of work (sometimes winding down)
- (4) Address security, IP protection, wkrs comp issues
- (5) **Don’t forget to focus on people being retained**

# 1 RIF Issues – Working Backwards

Voluntary departure (not involuntary)

Sued for not letting some people “volunteer”

Comparison employees treated better

Process not followed

No explanation or bad explanation . . .

- no witnesses left (everyone gone or fired too),
- nobody remembers criteria/reasons,
- nobody remembers claimant,
- different reasons given at different times
- different criteria applied by different people

Decision-maker: “not my decision”

Decision-maker: “performance not relevant”

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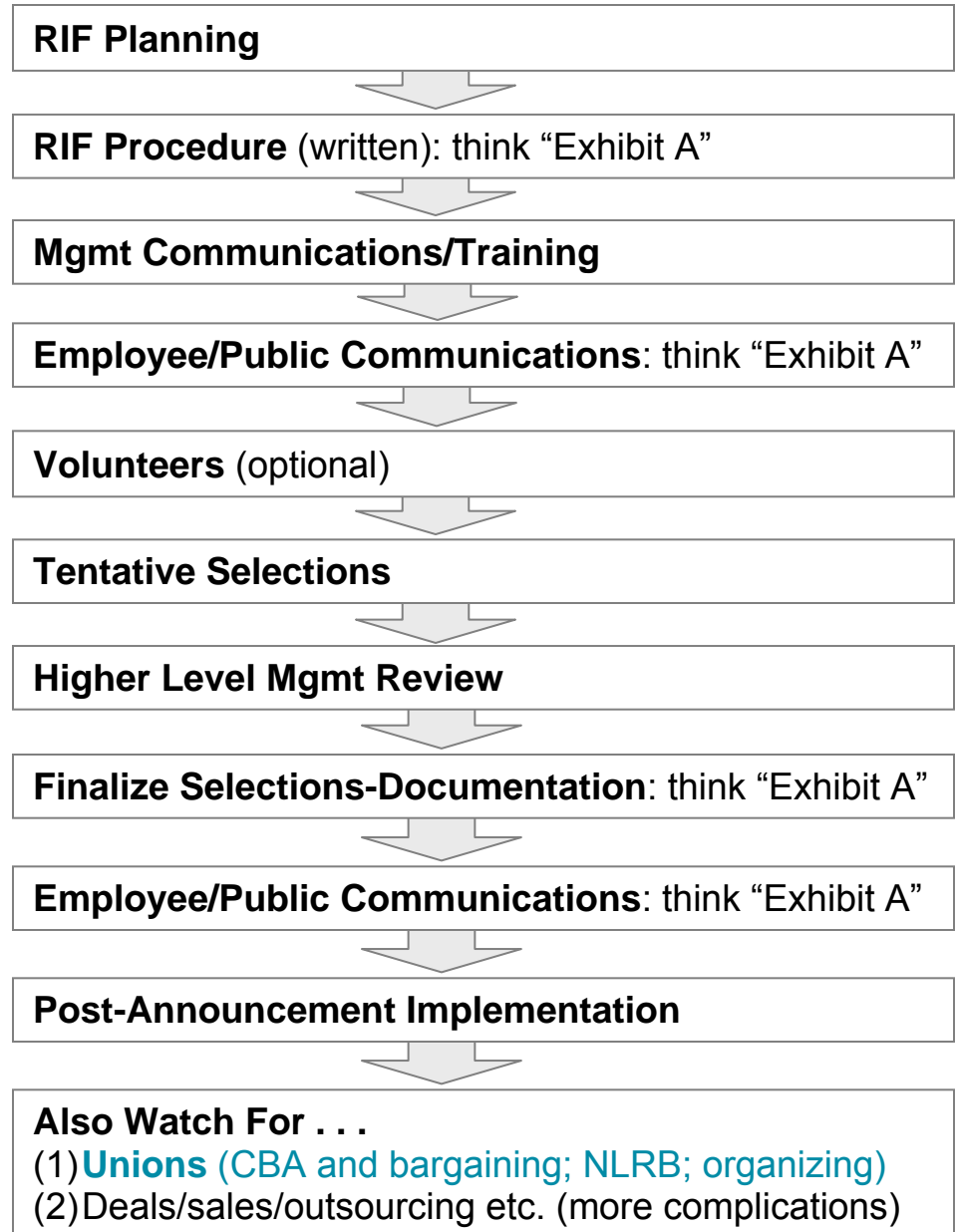
Terrible statistics – overall or particular groups

(older employees gone, younger employees kept, average age decrease, over/under 40 analysis, etc.)

Pre-RIF training or lack of pre-RIF training

Meaningful higher-level management review

Valid employee waiver of legal claims/damages



# 1 Top Ten RIF Mistakes

1. Too fast – improper pre-RIF planning
2. Too slow – multiple rounds of reductions, business paralysis, and “the retained employees are leaving” problem)
3. No process, no criteria, no control, no documentation, and (later) no witnesses who can remember anything or anybody
4. Performance evaluation problems, and failure to address them
5. Deficient “higher level management review” of RIF selections
6. Deficient (or no) statistical analysis of RIF selections
7. Failure to address severance pay plans and policies (“I thought you read the benefit plan” problem)
8. Failure to adequately address union/contract claims
9. Deficient waivers/releases (the “I thought you read our release form” problem and “people actually sue under OWBPA” surprise)
10. Inadequate and ineffective (or worse) communications, and WARN/state law notices (if required)

## 2 Performance Mgmt and RIFs

### Performance Management as “RIF Avoidance”

- (a) Higher performance: better business results
- (b) Better performance management: more headcount management  
*And . . . the headcount changes are more incremental*
- (c) Performance management promotes more voluntary attrition  
*And . . . the attrition involves people you want to lose*
- (d) Performance management promotes involuntary attribution  
*And . . . the separations are more incremental*  
*And . . . the separations involve people you want to lose*
- (e) RIFs portrayed as “unrelated” to performance should never be used as a “performance management substitute”  
*WATCH . . . unaddressed performance management problems frequently become reduction-in-force problems*  
*(the “conflict-avoidance-turned-into-legal-liability” problem)*



# Voluntary Departure Fundamentals

## Advantages to considering voluntary alternatives . . .

- significant reduction in legal risk
- arguably more “morale-friendly”

## Disadvantages to voluntary alternatives . . .

- less certainty and control over who stays versus who goes
- prolongs the process, may not be effective (or fast enough), and costs money
- risk that supervisors/managers may “hint” that bad performers should “volunteer”

## Possible alternatives . . .

- hours reductions and work sharing (and non-employment cost reductions)
- hiring freeze and attrition (watch: structural bottlenecks and need for exceptions)
- eliminate contract employees, temps and/or other “contingent” employees
- voluntary exit incentive programs – different flavors . . .
  - *available to everybody, all applicants accepted*
  - *available to selected departments or facilities, but not others*
  - *two-stage process: interested eligible employees volunteer, but Company may “reject” volunteers depending on business needs*
- other variations

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# 4 Severance Pay and Benefits Issues

- RIFs, layoffs, and other restructurings likely will have some impact on company benefit plans
- Many companies wish to provide some amount of severance pay to terminated workers
- Key to avoiding problems with benefit plans and severance pay arrangements is **advance planning**
- It is often possible to avoid or work around issues if they are identified in advance

# 4 Severance Pay and Benefits Issues

## Severance pay and severance pay plans

- Threshold issue is determining whether severance pay will be provided
- If severance pay **is not** to be provided:
  - *Review severance plans, agreements, and other arrangements to determine whether contemplated action will trigger severance pay obligations*
  - *Be careful with restructurings (e.g., sale of a subsidiary) that may result in a termination of employment from parent group and inadvertently trigger severance pay obligations*
  - *If necessary (and permissible), amend existing severance arrangements to eliminate severance pay obligations*
- If severance pay **is** to be provided, determine amount and form of severance:
  - *2 weeks of severance pay for each year of service*
  - *Severance paid in regular installments or lump sum*
  - *Severance pay stops when employee is reemployed*
  - *Include other noncash severance benefits (e.g., subsidized health coverage, outplacement assistance)*

# 4 Severance Pay and Benefits Issues

- Identify or establish a **vehicle** through which severance benefits will be provided
  - Use existing plan or policy? Amend existing plan or policy? Establish new plan or policy?
- Consider whether all or a portion of the severance benefits could be provided through a **supplemental unemployment benefit “SUB” plan** in order to minimize employment taxes paid on severance benefits
- Give careful consideration to **whether the vehicle is (or will be) an ERISA-covered welfare benefit plan** – mixed question of law and fact
- **Advantages** of being an ERISA-covered plan:
  - Potential ERISA preemption of state law claims (e.g., contractual claims or claims under state wage payment/collection laws)
  - Favorable body of case law supports a company’s right to amend or terminate severance pay plans (even shortly before the event giving rise to the right to receive severance) so long as the amendment is adopted in accordance with plan provisions
  - Deferential standard of review for any benefit disputes

# 4 Severance Pay and Benefits Issues

- **Disadvantages** of being an ERISA-covered severance pay plan:
  - Satisfaction of ERISA’s reporting and disclosure requirements (e.g., filing of Form 5500 annual reports and distribution of summary plan descriptions)
  - Compliance with ERISA’s fiduciary duty and claims and appeals requirements
- Ensure that severance pay arrangement **coordinates with other existing arrangements and requirements**
  - Make sure there is no overlap or double-dipping with other “regular” severance plans/policies, employment agreements, retention arrangements, etc.
  - May be desirable for severance arrangement to offset or coordinate with WARN
  - If identified in advance, often possible to design or amend severance arrangements to avoid problems (though bilateral agreements may require special treatment)
- Ensure that severance pay arrangements **comply with section 409A deferred compensation rules** (exceptions often available for broad-based severance arrangements)

# 4 Severance Pay and Benefits Issues

- Evaluate **possible impact of RIF, layoff, or restructuring** on other company benefit plans
  - Tax-qualified retirement plans:
    - *Substantial RIFs or layoffs may constitute a “partial termination” that requires full vesting for affected employees*
    - *Terminated employees may become eligible to receive retirement benefits and/or qualify for special plant shutdown or other subsidized benefits*
  - Incentive pay or bonus arrangements:
    - *Terminated employees may be eligible to receive pro rata payments*
    - *Arrangement may not have clear provisions regarding terminated employees*
  - Other welfare and fringe benefits (vacation pay and other paid time off arrangements, disability, insured benefits, tuition assistance, etc.)

# 4 Severance Pay and Benefits Issues

## Health plans and COBRA continuation coverage

- Group health plans (including medical, dental, and vision plans) must offer continuation coverage to “qualified beneficiaries” upon an involuntary termination of employment
- Duration of continuation coverage generally is 18 months, but can be shorter if certain intervening events (employee obtains coverage under another health plan, Medicare eligibility, plan termination, etc.) occur
- Spouse or other dependents may be eligible for up to 36 months of continuation coverage in some circumstances
- Plan sponsor can require that qualified beneficiaries pay 102% of the cost of continuation coverage

# 4 Severance Pay and Benefits Issues

## COBRA Subsidy in the American Recovery and Reinvestment Act of 2009

- “Assistance Eligible Individual” (AEI) who pays 35% of the cost of COBRA continuation coverage is treated as paying the full cost of the continuation coverage for 9 months
- 65% balance of cost is paid to plan sponsor as a “credit” against payroll taxes (or as a cash reimbursement if subsidy exceeds amount of plan sponsor’s payroll tax obligations)
- Definition of an AEI is any qualified beneficiary who
  - *at any time between September 1, 2008 and December 31, 2009 is eligible for COBRA coverage,*
  - *elects COBRA coverage, and*
  - *whose eligibility for COBRA coverage stems from an involuntary termination of employment.*

# 4 Severance Pay and Benefits Issues

- Additional COBRA election must be offered to individuals who are AEIs but who do not have COBRA coverage as of the date legislation was enacted
  - This means that plan sponsors must go back and provide additional COBRA elections to certain employees who were involuntarily terminated on or after September 1, 2008
- Plan sponsors will need to (i) update COBRA notice/election materials to describe subsidy and (ii) distribute updated notices to existing and future AEIs
- Although subsidy is “paid back” to plan sponsor, the potentially large group of qualified beneficiaries electing COBRA coverage and the “adverse selection” phenomenon may result in increased costs for plan sponsors

# 5 Waiver/Release Fundamentals

- Ubiquitous . . .



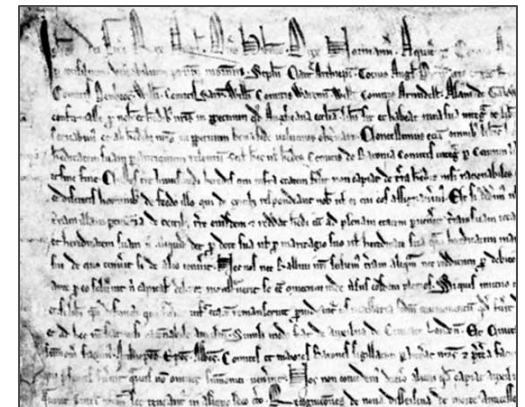
*yoo-BIK-kwi-tes; Adjective*

Being or seeming to be everywhere at the same time.  
Omnipresent. Constantly encountered.

– *The American Heritage Dictionary of the English Language (4<sup>th</sup> ed. 2000)*  
– *Miriam-Webster Online Dictionary (2006)*

- Lawsuit and settlements
- Reductions-in-force, plant closings, etc.
- Performance-related separations (especially the “messy” ones)
- Severance pay and related employee benefit plans
- Real money and easy class actions
- Hidden problems and organizational lethargy . . .
  - All companies have their favorite release form
  - Question: Where did some releases come from?

Answer: ***Magna Carta*** (and some releases have never changed since then!)



# 5 Waiver/Release Fundamentals

## General OWBPA Requirements - see ADEA, 29 U.S.C. § 626(f)

– Individuals cannot waive ADEA rights unless waiver is “knowing and voluntary”

– Requirements for ADEA waivers to be knowing and voluntary . . .

1. **Understandability** – waiver agreement must be “written in a manner calculated to be understood by [the] individual, or by the average individual eligible to participate”
2. **Mention ADEA** – waiver “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** – waiver is “only in exchange for consideration in addition to anything of value to which the individual already is entitled”
5. **Go 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” (see special rule for exit incentive/group waivers)
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”

# 5 Waiver/Release Fundamentals

## Group obligations under OWBPA – when required?

When waiver requested “in connection with an exit incentive or other employment termination program offered to a group or class of employees”

(1) Consideration period expanded: 45 days rather than 21 days

(2) Mandatory disclosures are required:

**Employer must** “at the commencement” of the review period do the following:

» 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,” (“decisional unit” – term added by EEOC regulations)
- (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) “the ages of all individuals in the same job classification or organizational unit who are **not** eligible or selected for the program”

# 5 Waiver/Release Fundamentals

## Example of OWBPA Mandatory Disclosure (from regulations)

- (A) The decisional unit is the **Construction Division**.
- (B) All persons in the Construction Division are **eligible** for the program. All persons who are being terminated in our November RIF are **selected** for the program.
- (C) All persons who are being offered consideration under a waiver agreement must sign the agreement and return it to the Personnel Office **within 45 days** after receiving the waiver. Once the signed waiver is returned to the Personnel Office, the employee has **7 days to revoke** the waiver agreement.
- (D) The following is a listing of the **ages and job titles** of persons in the Construction Division who **were** and **were not** selected for termination and the offer of consideration for signing a waiver:

Job Title	Age	No. Selected	No. Not Selected
(1) Mechanical Engineers, I	25	21	48
	26	11	73
	63	4	18
	64	3	11
(2) Mechanical Engineers, II	28	3	10
	29	11	17
	Etc., for all ages		
(3) Structural Engineers, I	21	5	8
	Etc., for all ages		

# 5 Waiver/Release Fundamentals

- **“Decisional Unit” – Full Employment for Lawyers**

OWBPA regulations . . .

- *“that portion of the employer’s organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver”*
- *“developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program”*

Importance of “decisional unit” . . .

- *defines who must get disclosures (i.e., “each person in the decisional unit who is asked to sign a waiver agreement”)*
- *“decisional unit” itself must be described in disclosures (i.e., the “class, unit, or group of individuals covered by [the] program”)*
- *defines scope of age/position data that must be disclosed*
- *Bottom Line: get the decisional unit wrong, and ADEA release is invalid*

# 6 WARN Fundamentals

## WARN Formula – Diagram A . . .

Notice is required on Day 0 (see point “A”) if

- (a) if there are employment losses, defined as (1) terminations, (2) 50 percent hours reductions for each of 6 months, and/or (3) layoffs exceeding 6 months,
- (b) within a 30- or 90-day window period (see “B”),
- (c) at a “single site of employment,”
- (d) in sufficient numbers to constitute a “plant closing” or “mass layoff.”

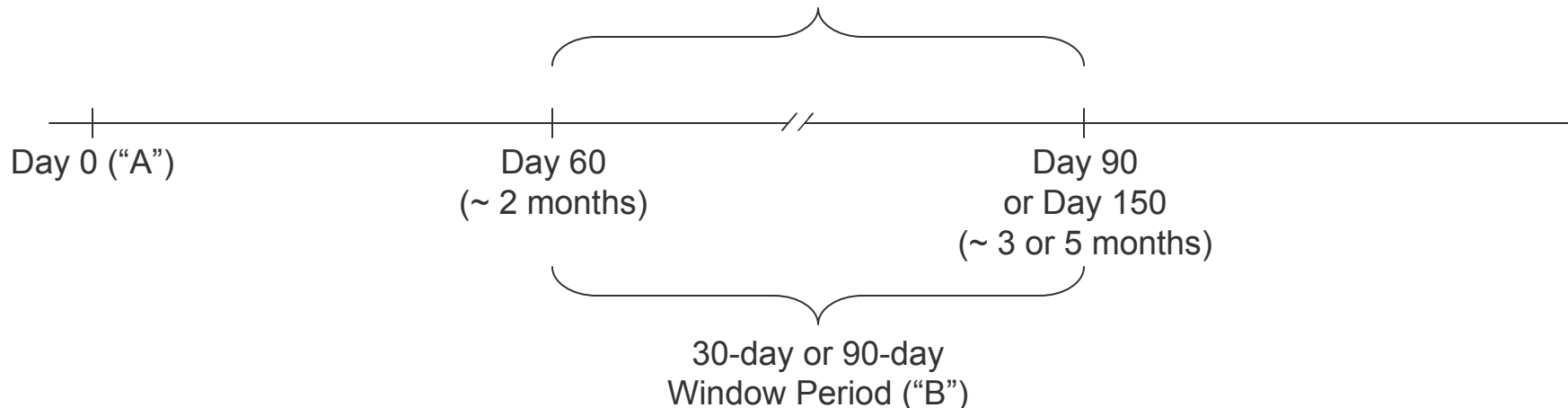
WATCH: “Part-time” employees are not counted (as defined in WARN); watch for cases where WARN’s exceptions, exemptions or exclusions might apply; also watch for state/local laws.

Add number of:

(1) terminations, and/or

(2) 50 percent hours reductions for each of 6 months, and/or

(3) layoffs exceeding 6 months



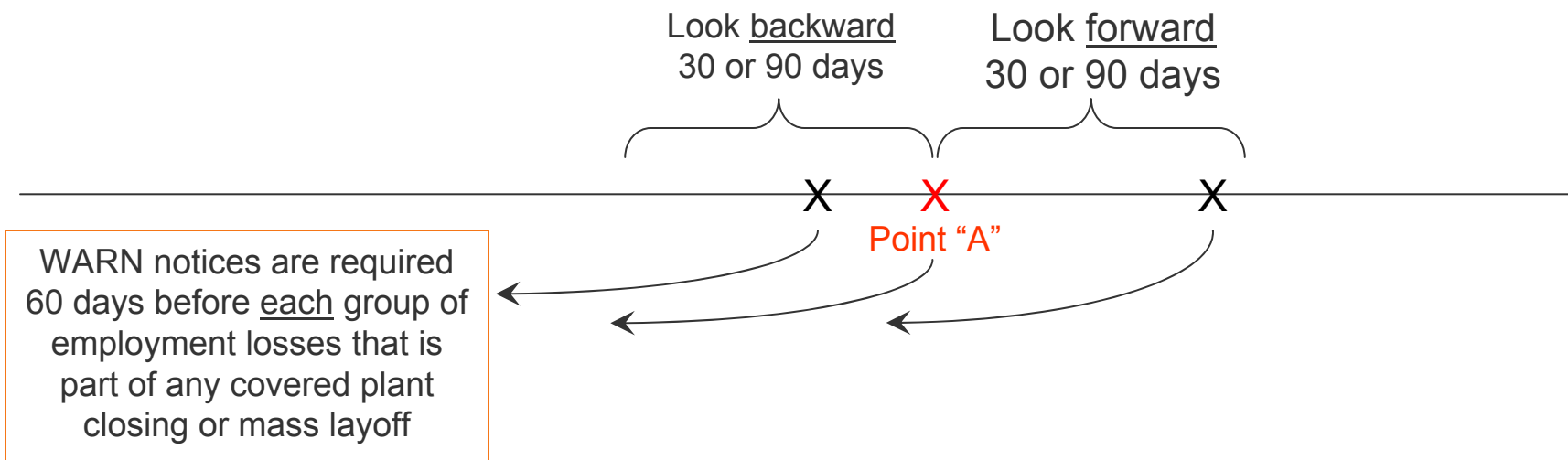
# 6 WARN Fundamentals

## WARN Formula – Diagram B . . .

Starting with anticipated date of planned employment losses (see Point “A”), evaluate other employment losses looking forward and backward 90 days and/or 30 days to see whether there is a WARN-triggering plant closing or mass layoff. “Part-time” employees are not counted (as defined in WARN). Watch for cases where WARN’s exceptions, exemptions or exclusions might apply; also watch for state/local laws.

Add number of:

- (1) terminations, and/or
- (2) 50 percent hours reductions for each of 6 months, and/or
- (3) layoffs exceeding 6 months



# 6 WARN Fundamentals

## WARN Exceptions, Exemptions and Exclusions

1. Relocations/consolidations
2. Sales of part or all of a business
3. Temporary facilities, projects and undertakings
4. Strikes/lockouts
5. Unforeseeable business circumstances
6. Natural disasters
7. Faltering companies
8. Part-time/low service employees (“quasi-exception”)
9. State and local laws
  - WATCH: most are very different from WARN (and more restrictive!)

# 6 WARN – Top 10 Mistakes

1. **“Mass layoff” definition . . .**
  - 500 employees at a single site (excluding part-timers)
  - 33% of employees at a single site (excluding part-timers) provided at least 50 employees lose employment
2. **“Plant closing” definition . . .**
  - shutdown of a single site, facility (building), or “operating unit”
  - . . . resulting in 50 or more employment losses (excluding part-timers)
3. **We won’t have a ‘plant closing’ because we do not have any ‘plants’**
4. **We won’t have ‘plant closing’ because hundreds of our employees will still work at the XYZ facility**
5. **We won’t have a ‘mass layoff’ because we terminate people, we don’t lay them off**
6. **WARN notice problems . . .**
  - “We took care of WARN because we already posted our WARN notice”
  - “Employee separations will take place in August or September 2007 . . .”
7. **WARN “counting” . . .**
  - *Usually aggregate over 90 days*
  - *Layoffs count only if they exceed 6 months*
  - *60 days’ notice is required*
  - *Counting is separate at each “single site” of employment*
8. **We don’t need WARN notices – everyone got 3 months’ severance pay**
9. **This was all unforeseeable, so WARN notices are not required**
10. **We complied with WARN. We don’t have to worry about state/local laws**

# 7 RIF – Restructuring Resources

## Morgan Lewis Workforce Change

- *Reduction-in-Force “Short List” Action Item Summary* (checklist)
- *Troubled Economy Survival Kit for Employers – Solutions for Difficult Times* (Morgan Lewis LawFlash)
- *“Your Next Reduction in Force: The Dirty Little Secret”* (EmploymentLaw360)
- *Voluntary Separation Programs – Overview* (white paper)
- *Managing Workforce Reduction Legal Issues: Strategies for the Real World* (Morgan Lewis/Workforce Change webcast, February 17, 2009 and March 10, 2009, an invitation will be sent out soon)
- *Morgan Lewis – Workforce Change InSight* (email letter – ongoing)
  - **to receive ML Workforce Change InSight, visit <http://morganlewis.com/subscribe>**

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February 17, 2009