

LAYOFFS 2.0 - REVIEW OF POTENTIAL WARN AND OWBPA ISSUES

Checklist of Considerations and Tasks to Complete

1. Any potential “plant closing” or “mass layoff” should trigger WARN Act and state “mini-WARN” act analysis
 - Are you a covered “employer” under WARN? Did you include part-time employees in determining whether you had enough employees to trigger WARN Act coverage?
 - Plant Closing:** Are you planning a permanent or temporary shutdown of a “single site of employment” or one or more “facilities” or “operating units” within a single site of employment, which results in 50 or more employees suffering an “employment loss”?
 - Mass Layoff:** Are you planning a reduction in force, other than a plant closing, that within a 30-day period will result in an “employment loss” at a “single site of employment” of either 1) 500 or more employees, or 2) at least 50 employees who are one-third or more of the site’s active employees?
 - If you have done or are contemplating multiple rounds of layoffs, have you reviewed the applicable time periods under WARN by which separate layoffs may be aggregated to determine whether the WARN notice requirements are triggered, even if neither layoff by itself would be sufficient to trigger notice?
 - Have you carefully reviewed what constitutes a “single site of employment” under WARN to determine if a group of facilities which are close to each other might constitute a “single site”?
2. An increasing number of states have adopted “mini-WARN” statutes, some of which impose different and sometimes more rigorous notice requirements than the federal WARN Act does
 - Are you having either a plant closing or mass layoff in any states which have “mini-WARN” statutes? If so, do you have any notice requirements?
3. Have you reviewed your release agreements to make certain that they reflect the latest case law and regulatory developments?
 - Do they carve out claims that may not be released, such as workers compensation, unemployment, or wage and hour claims?
 - Although most False Claims Act/qui tam “whistleblower” claims cannot be released, have you considered including a representation by the employee that they are not aware of any facts which would give rise to such claims?

- Although releases cannot generally release wage and hour claims, do your releases include language by which the employee agrees that they have been paid for all hours they worked?
 - Do your release agreements include “covenant not to sue” language which applies to age discrimination claims under the ADEA and may require employees to pay the employer’s attorneys’ fees if they sue to enforce a claim covered by the release? Such clauses can be considered as unlawful retaliation by the EEOC.
 - Have you complied with specific state law requirements applicable to releases, such as those under West Virginia, Minnesota, and California law?
4. Are you in compliance with the statistical disclosure requirements necessary to obtain an enforceable release of Federal age discrimination claims under ADEA (the OWBPA data)?
- Have you properly defined the “decisional unit”, and/or the “job classification or organizational unit”?
 - Have you allowed employees in any layoff of 2 or more persons the 45 days required to consider whether to sign the release?
 - Is your release agreement and related disclosures written in a manner calculated to be understood by the average individual eligible to participate?
 - Are you properly handling the disclosure of statistical information relating to those employees whose original positions may be eliminated but who are eligible for or are offered transfers to other positions?
 - If you have phased or succeeding layoffs, are you providing cumulative statistical data regarding earlier layoffs to those employees impacted, if such employees are part of the same “employment termination program”, such that the data they are getting is current and accurate?
 - Do your OWBPA disclosures adequately disclose the “eligibility factors” to receive benefits under the program, including the factors to determine who got laid off and who did not?
 - Do you have a system in place to advise affected persons if you discover that some of the ADEA statistical data previously distributed was wrong?
 - Have you considered consciously not requiring a release of Federal age discrimination claims so as to not have to comply with the statistical and other disclosure requirements of OWBPA in those situations where you think there is likely little risk of age discrimination claims being made?