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## EXECUTIVE SERIES: LABOR & EMPLOYMENT



## Reduction In Force (RIFs)

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## Steven Kerbaugh, Esq.

Partner | Labor & Employment Group



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### Overview

- Represents companies in employment and commercial litigation, and advises them on employment matters affecting their daily operations
- Represents clients in unfair competition claims, including actions involving alleged violations of restrictive covenants, tortious interference with contracts and misappropriation of trade secrets
- Also focuses on defending employers and executives accused of discrimination and unfair employment practices, including wrongful termination and retaliation matters

### Degrees

- J.D., magna cum laude, University of Minnesota Law School
- Diploma in International and European Law/Comparative Law, Université Jean Moulin (Lyon III)
- B.A., summa cum laude, University of Wisconsin

## Mark Nehme, Esq.

Associate | Labor & Employment Group



Newark, NJ  
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### Overview

- Represents employers in labor and employment disputes, handles related investigations and provides counseling to help clients comply with workplace regulations and laws
- Experience includes resolving wage and hour and related discrimination claims brought against employers, as well as litigating grievance arbitrations and unfair labor practice charges before state-sponsored arbitrators and state employment relations agencies

### Degrees

- J.D., Seton Hall University School of Law
- B.A., Rutgers University

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## Reductions in Force

- Two Types
  1. Voluntary Reductions – offering special benefits to those who leave (i.e., exit incentive programs) in exchange for a release
  2. Involuntary Reductions (i.e., layoffs)
- Both types of RIFs come with their own legal risks

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## Initial Considerations

- **Step 1:** Identify the basis for the RIF
- **Step 2:** Develop objective selection criteria
- **Step 3:** Objectively apply criteria
  - Involvement of management with knowledge of potentially affected personnel
  - Avoid one-person decision-making
  - Create an independent committee
  - For unionized workplaces, bumping rights may exist across seniority or work location bases

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## Disparate Impact Analysis

- **Step 4:** Conduct a disparate impact analysis
  - Involve counsel and HR
  - Identify the proportions of those in legally protected classes
  - Identify those who are on/have recently taken protected leaves
  - Identify those who have recently engaged in other protected activity
  - Ensure that there is no disparate impact on any protected class and that no individual is being targeted for engaging in protected activity
  - Make non-discriminatory adjustments to the list as appropriate

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## Termination

- **Step 5:** List review – Ensure the termination of those on the list:
  - Reflects the documented goals of RIF
  - Will not lead to discrimination or disparate impact
  - Will not lead to potential retaliation claims

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## Severance and Separation

- **Step 6:** Craft a severance package
  - If possible, offer employees something that they would not otherwise be entitled to:
    - Severance pay
    - COBRA premium payments
    - Job placement services
  - Benefits: Employee goodwill, risk mitigation
  - Ensure that the amount of severance compensation is objectively determined

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## Severance and Separation

- **Step 6:** Craft a severance package (con't)
  - Create a separation agreement with:
    - A full release of claims
    - A no admission of liability provision
    - Preservation of confidentiality or restrictive covenant obligations
  - But without:
    - A release of unwaivable claims
    - Language precluding employees from filing charges with applicable federal and state government agencies
    - If applicable, language infringing on rights under the National Labor Relations Law

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## Severance and Separation

- **Step 6:** Craft a severance package (con't)
  - Ensure Older Workers Benefit Protection Act compliance by including in the agreement:
    - Specific reference to a release of ADEA claims
    - Written notice to consult with counsel before signing
    - Required consideration period
    - Required rescission/revocation period
    - Required informational attachment
  - Ensure compliance with ERISA if the separation program is a covered plan

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## WARN Act – A summary

- The WARN Act requires employers to provide 60-days' advance notice to workers if the employer anticipates closing a plant or engaging in a mass layoff
- Employers must also provide notice to certain government agencies
- Employers who fail to meet the WARN Act requirements must pay affected employees wages for the balance of the 60-day notice period that they did not receive, and pay fines to government agencies

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## WARN Act - Employers

- The WARN Act applies to:
  - Employers with 100 or more employees, excluding **part-time employees**; or
  - Employers with 100 or more employees who work at least an aggregate 4,000 hours per week
- The 100 employee threshold includes all employees, regardless of location
- Workers on leave expected to return count to the 100 threshold
- Independent contractors do not count to the 100 threshold
- A part-time employee is one who has been employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required, including workers who work full-time

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## WARN Requirements

- WARN employers must give sixty-days' written notice to affected employees in advance of:
  - Plant Closing
  - Mass Layoff

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## **WARN Act – Aggregation Rules**

- Typically, WARN looks to a 30-day period to determine whether there have been enough employment losses for an event to qualify as a plant closing or mass layoff
- However, WARN is also triggered by a 90-day aggregation
  - Aggregate of multiple employment losses
  - Within 90-day period
  - Not result of separate/distinct causes
- Rolling 30- and 90-day periods

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## **WARN Act - Penalties**

- Litigation Costs/Attorneys' Fees
- Back Pay/Benefits - per day of violation
- Fines - \$500 for each day of failure to notify local government

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## State and Local Equivalents (Mini-WARNs)

- States and municipalities have their own WARN Acts
- Additional requirements:
  - Some apply to smaller employers
  - Some require increased compensation

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## An example of Mini-WARN

- New Jersey Millville Dallas Airmotive Plant Job Loss Notification Act
- Example of a Mini-WARN that can be larger than federal WARN
- 90-day notification requirement
- Mandatory severance
- Expansive definition of “employer”

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## Recall Rights

- In certain contexts, employees will retain rights to be rehired following a RIF
  - Union negotiation – CBAs may imbue employees with recall rights
    - In these instances, employers should carefully negotiate for reasonable limitations on the duration of these rights
  - Statutes or regulations – e.g., NY Fair Workweek Law
    - Cannot fire or reduce the hours of a worker by more than 15% without just cause or a legitimate business reason
    - Must reinstate laid off employees by seniority when hours become available

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## General Considerations

- With RIFs, communication is key
  - Develop a communication plan
  - Be empathetic in messaging
  - Pre-designate contact persons and provide them with the necessary information, including information about the process, talking points, and points to avoid, especially in the labor relations context

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## Unionized Workforces

- A note on unionized workforces
  - Carefully review obligations under any applicable collective bargaining agreement
  - Generally, the union will need to be consulted, especially in effects bargaining
  - WARN includes a notification requirement to any applicable unions
  - Employer messaging should be carefully curated to avoid promises/threats or indication of a refusal to participate in effects bargaining

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## Final Thoughts

- Carefully examine goals before taking measures that adversely affect employees
- Don't rush to the RIF
- Assess options, weighing the costs and the benefits
- Planning is key
- Document, document, document

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