RIGHT-SIZING AND REDUCING WORKFORCE: NAVIGATING SEVERANCE AGREEMENTS, ADVERSE IMPACT STUDIES AND, THE WARN ACT

By: Kaitlin A. Brown

I. IDENTIFY TERMS TO CONSIDER INCLUDING IN SEVERANCE AGREEMENTS

A. Severance Agreements protect employers and ease the transition for employees. To accomplish each of these goals, however, you must consider the appropriate terms that should be included.

B. What compensation, bonus, or benefits is the employee entitled to receive pursuant to a contract or policy?

1. Review relevant contracts to determine whether the employee is entitled to any severance pay or other benefits upon separation and resignation.

2. Review employee handbook to determine whether the employee is entitled to unused, accrued paid time off upon termination or resignation.

3. In terms of wages, be sure to pay non-exempt employees for all hours worked. Exempt employees must be paid for the proportionate number of hours or days worked, in relation to their weekly salary.

4. Be clear as to which benefits have vested (*e.g.*, in terms of 401(k), profit sharing, or pensions).

C. What is the company offering as additional consideration (that the employee does not otherwise have a right to receive)? For example:

1. If offering monetary payment, will it be paid as a lump sum or pay continuance?

2. Will the employee receive a pro-rata portion of any discretionary bonus?

    a. If so, how much will the company pay the employee?

3. Does the employee have any benefits through the company?

    a. If so, will the company offer to continue health insurance benefits through COBRA? If so, for how many months? Will such payments be made directly by the company or as reimbursements to the employee?

4. Does the employee have any remaining unused accrued PTO, vacation, or sick time?

    a. If so, what is the company's policy regarding payment upon termination/resignation?

b. Is there a negative balance? Did the company obtain the employee's prior authorization to deduct such negative balance from final paycheck? Is the company willing to forego recoupment of payments?

5. Has the employee engaged in any misconduct that prompted the termination?

   a. If so, will the company offer to not challenge the employee's application for unemployment compensation?

   b. If not, does the company want to allocate the additional compensation to a certain number of weeks to avoid paying unemployment insurance benefits in those weeks (see paragraph 4(a))?

6. Will the company be offering outplacement services to assist the employee with finding a new job?

7. Will the company be offering a neutral letter of reference?

8. Is the employee being considered as having been terminated, resigned, or separated?

   a. Providing employees with the option of resignation as opposed to termination is a benefit the company may offer at no cost, which may significantly ease the employee's transition the employee's next job.

9. Will the employee be receiving any type of deferred compensation?

   a. If so, address 409A implications to expressly state that the employee shall be responsible for income tax obligations arising from all payments issued to employee by company.

D. Release of employer.

1. Release should be effective through the date that the agreement is signed.

2. Consider including an agreement not to sue the company for any claim that has been released.

3. Are there any specific individuals who should be specifically included in release?

   a. If so, insert their names into the release.

4. Are there any pending charges or cases that must be dismissed with prejudice as a result of the Release Agreement being signed?

   a. If so, be sure to specifically identify the charge or case that must be dismissed with prejudice upon signing the release, and the timeline for doing so.

5. Include extensive list of employment laws under which claims are being released.

    a. Is the company a federal contractor?

        i. If so, then make sure that the release includes a release of claims under the following statutes: Executive Order 11246, Executive Order 11141, Vietnam Era Veterans Readjustment Assistance Act of 1974, the Federal Railroad Safety Act, Vocational Rehabilitation Act of 1973.

    b. Is the employee working out of state? Or is the company incorporated out of state?

        i. If so, modify the release to include out of state laws under which a claim may be asserted.

6. Include carveout permitting the employee to file a charge with, or otherwise participate in an investigation conducted by, EEOC or respective government agency.

    a. Include waiver of monetary damages resulting from any such charge filed.

E. Did the employee sign a confidentiality agreement?

1. If so, make sure that any obligation to maintain confidentiality in the release comports with the previously signed agreement, or at the very least does not abrogate the prior restraint to make it less protective. Consider whether the original confidentiality agreement appropriately covers all proprietary and confidential information of the company, and if not expand the restriction. Also consider adding language required by Defend Trade Secrets Act to preserve the option for increased damages, in the event that employee misappropriates trade secrets of the company.

2. Consider whether the employee had access to any customer confidential information that could result in liability to the company if disclosed. If so, create specific provisions in the release that require the employee to maintain confidentiality of the customer's confidential and proprietary information.

F. Does the company prefer to make the agreement confidential?

1. If the employee has articulated a claim of sexual harassment, then certain tax benefits will be lost if the agreement is required to be confidential.

G. Confirm whether the employee had any company property.

1. If so, insert a provision in the release that requires the employee return to the company all company property, confidential information, and data, regardless of the format, that is in the possession or control of the employee.

H. Did the employee enter into restrictive a non-competition agreement?

1. If so, consider whether the prior restraint is sufficient to protect the company's business interests. If not, modify the non-competition restraint to reflect the terms of the agreement and/or reasonable and appropriate preferred terms for time, geography, and business purpose for the restraint.

2. If not, consider whether there is a business interest that must be protected, given the employee's departure from the company. Insert a non-competition restraint to reflect the reasonable and appropriate preferred time, geography, and business purposes for restraint.

I. Did the employee enter into a non-solicitation agreement?

1. If so, consider whether the prior restraint is sufficient to protect the company from the employee soliciting the company's employees, customers, and clients. Insert a non-solicitation restraint to reflect the terms of the original agreement and/or reasonable and appropriate preferred time and contacts with whom the employee should refrain from contacting to transact business or to terminate association with the company.

2. If not, consider whether there is a business interest that must be protected, such that employee should be restrained from soliciting company employees, customers, and clients. Insert a non-solicitation paragraph to reflect the reasonable and appropriate preferred time and contacts with whom the employee should refrain from contacting to transact business or to terminate association with company.

J. Did the employee enter into a non-disparagement agreement?

1. If so, consider whether the prior restraint is sufficient to protect the company from disparaging comments. Make sure any non-disparagement restraint in the release reflects the terms of the prior agreement and/or expand the restraint to enhance protections. Consider whether the business wishes to expand/add to such restraint.

2. If not, consider inserting a non-disparagement restraint that prohibits the employee from defaming the company.

K. Include express terms about ramifications upon breach of agreement. For example:

1. Ex parte relief or injunction, providing the company with the option to seek an order from a judge, on an expedited basis, to demand that employee cease and desist from any further action in violation of the agreement.

2. Other remedies, in equity or at law.

3. Upon breach of restrictive covenant, the restrictive period is tolled for the period of breach.

4. To deter employees from breaching the agreement, consider myriad options for recovering damages or expediting recovery upon breach. For example, employers may consider including:

a. A "clawback" provision, stating that upon breach by employee, employer shall no longer be liable for any outstanding payments and employee is required to pay back any amounts previously paid under the agreement. This is one of the harsher options, which may result in pushback from employees and/or their counsel.

b. Liquidated damages clause, providing that upon breach (*e.g.*, of confidentiality agreement or non-disparagement), employee agrees to pay a sum certain.

L. Include clause stating that, by entering into the agreement, the company is not admitting to any liability, which is expressly denied. Rather, settlement was intended to avoid additional costs that may otherwise be associated with litigation.

M. Did the employee sign any other agreements with the company that include terms that survive termination (*e.g.*, any contract with obligation to maintain confidentiality, non-competition, non-solicitation, etc.)?

1. If so, incorporate those prior agreements by adding the date and full title of those agreements into the paragraph defining the entire agreement, to the extent that the surviving terms are intended to be incorporated into the agreement.

N. Include a paragraph whereby the employee acknowledges that the employee is signing the agreement knowingly and voluntarily without duress, has had an opportunity to have an attorney review the agreement, and that the employee understands the terms contained in the agreement.

II. CONDUCT ADVERSE IMPACT STUDIES TO ASSESS AND MITIGATE POTENTIAL RISK

A. Where does the requirement for an adverse impact study stem from?

1. Federal and state laws prohibiting discrimination based on protected classes (*e.g.*, Title VII, Age Discrimination in Employment Act, Michigan's Elliott-Larsen Civil Rights Act, Michigan Persons With Disabilities Civil Rights Act).

2. Understand the requirements under the Age Discrimination in Employment Act ("ADEA").

a. ADEA applies to employers with 20 or more employees.

b. The general rule requires employees be given a reasonable time to consider the agreement, which varies based on the circumstances and may require flexibility in providing extensions if requested. However, if the employee being released is age 40 or older, then ADEA requires that additional criteria be met in order for a business to obtain a valid waiver of an age discrimination claim.

c. If the employee being separated is over age 40, determine whether the employee has 21 or 45 days to consider the agreement based on the following:

i. Is the company terminating two or more employees over age 40 at same or similar time (reduction in force), not for performance reasons?

(A) If yes, then the separated employee has 45 days to review and consider the agreement.

(B) Also provide the disclosures/adverse impact study attached as an exhibit.

(C) If no, then the separated employee has 21 days to review and consider the agreement. No adverse impact study is necessary.

ii. Include a revocation period of at least 7 days after the employee accepts the agreement for the employee to change their mind and revoke such acceptance.

iii. This adverse impact study must identify:

(A) The unit considered as part of the separation (do not rely on a protected classification, but rather focus on departments, job titles, location, etc.);

(B) Each employee in the unit (by position title, not name);

(C) The age of each employee in the unit; and

(D) Whether the employee was offered severance.

d. If the employee being separated is under age 40, provide the employee with a specific number of days or a specific deadline to review and consider the agreement. Employees under age 40 must be given a reasonable time to consider the agreement, which varies based on the circumstances and may require flexibility in providing extensions if requested.

B. An adverse impact analysis evaluates the potential risk associated with both positive offers (*e.g.*, exit incentives, early retirement) as well as negative adverse actions (*e.g.*, terminations, temporary layoffs, demotions).

1. EEOC recommendations.[1]

[1] Equal Employment Opportunity Commission, Avoiding Discrimination in Layoffs or Reductions in Force (RIF), https://www.eeoc.gov/employers/small-business/avoiding-discrimination-layoffs-or-reductions-force-rif

a. List the employees subject to the action/offer, along with the selection criteria. Compare the demographics of those being selected to those in the group considered for selection.

b. Determine whether certain groups of employees, based on demographics, are affected more than other groups.

c. If certain groups of employees are affected more than other groups, based on demographics, determine if you can adjust your selection criteria to limit the impact on those groups, while still meeting your business's needs.

C. Consider the appropriate test for gauging the significance of a disparate impact. This depends on several factors, such as the size of your workforce, the size of group considered for separation, the size of the group selected, etc. Generally speaking, the smaller the group at issue, the less reliable these tests may be – and some flexibility may be warranted.

1. 4/5ths or 80% Rule (referenced by EEOC and DOL)

a. How it works:

i. For each protected class, take the number of people selected divided by the total number of people in the group considered for selection.

ii. Divide the percentage for protected class in the majority group by the percentage for the protected class in the minority group. If that percentage is less than 80%, the selection may be suspect for being not random and potentially discriminatory in motive. If that percentage is greater than 80%, it will be more likely considered a random discrepancy not attributable to discrimination.

iii. *Caveat:* If the group selected is small, this may lead to a false result, particularly if the difference of one employee bridges the gap.

b. The agencies have adopted a rule of thumb under which they will generally consider a selection rate for any race, sex, or ethnic group that is less than four-fifths (4/5ths) or eighty percent (80%) of the selection rate for the group with the highest selection rate as a substantially different rate of selection.

c. This "4/5ths" or "80%" rule of thumb is not intended as a legal definition, but is a practical means of keeping the attention of the enforcement agencies on serious discrepancies in rates of hiring, promotion and other selection decisions.[2]

d. Smaller differences in selection rate may still constitute adverse impact where the differences are significant in both statistical and practical terms, or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group.[3]

2. Statistical significance (generally effective for larger groups at issue)

a. Under the statistical significance approach, adverse impact may be found where the protected group is affected at "significantly" greater rates compared to the non-protected group. Probabilities are usually determined by p-values, which are the probability the disparity would occur if the selections were random.

b. "Significance" is a concept in statistics that corresponds to a probability threshold of 0.05 or below, to distinguish disparities consistent with random selection from those that are more likely to be systematic. The .05 probability threshold closely corresponds to "two standard deviations." The Supreme Court has stated that "[a]s a general rule for . . . large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the [result] was random would be suspect to a social scientist."[4]

c. Additionally, many courts accept a 0.05 probability level [p-value] as sufficient to rule out the possibility that the disparity occurred at random.[5]

3. Chi-Square Test

---

[2] Equal Employment Opportunity Commission, Adoption of Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines

[3] 29 CFR § 1607.4(D)

[4] *Castaneda v. Partida*, 430 U.S. 482, 496 n.17, 97 S. Ct. 1272, (1977).

[5] See, e.g., *Waisome v. Port Auth.*, 948 F.2d 1370, 1376 (2d Cir. 1991) ("Social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for a deviation could be random and the deviation must be accounted for by some factor other than chance." (internal citation omitted)); *Palmer v. Shultz*, 815 F.2d 84, 92-96, 259 U.S. App. D.C. 246 (D.C. Cir. 1987) (noting that "statistical evidence meeting the .05 level of significance . . . [is] certainly sufficient to support an inference of discrimination" (citation and internal quotation marks omitted, alterations in original)).

a. The Chi-Square test determines whether two observed values differ from their expected values and whether the difference is likely due to chance.

III. DETERMINE WHETHER THE WARN ACT IS TRIGGERED AND HOW TO COMPLY

A. Determine whether the business is a covered employer.

1. The WARN Act applies to employers who have at least:

a. 100 employees (excluding those who worked less than 6 months in the prior 12 months and those working less than 20 hours per week); or

b. 100 or more employees, including part-time employees who, in the aggregate, work at least 4,000 hours per week, exclusive of overtime hours.

B. Understand when an employer is obligated to provide a WARN Act notice.

1. Covered employers are required to provide at least 60 days' advance notice before a plant closing or a mass layoff, with a couple exceptions.

a. **Plant Closing:** A plant closing occurs when an employment site (or one or more facilities or operating units within an employment site) shuts down resulting in an employment loss of 50 or more employees during any 30-day period.

b. **Mass Layoff:** A mass layoff occurs when there is no plant closing, but the layoffs will result in an employment loss of: (a) 500 employees at the employment site during any 30-day period, or (b) 50-499 employees at a single employment site during any 30-day period, if they make up at least 33% of the employer's active workforce. (See below for further discussion of how "employment site" is defined).

c. **Multiple Related Losses During 90-Day Period:** If the number of employment losses during a 30-day period fails to meet the threshold of a plant closing or mass layoff, but 2 or more groups of workers (each of which is less than the threshold level) meet the threshold level during any 90-day period, notice must be provided. Job losses within any 90-day period count toward WARN Act threshold levels unless the employer demonstrates the employment losses during the 90-day period are the result of separate and distinct actions.

2. Exceptions. No WARN Act notice is required when:

a. **There is no employment loss.** This means that the 60-day notice is not required when effectuating: (a) a layoff equal to or less than 6 months, (b) a reduction in an employee's hours of work that does not exceed 50% each month for six months, (c) an offer of transfer within reasonable commuting distance within 6 months; or (d) an offer of transfer (regardless of the commuting distance) within 6 months, which is accepted by

the employee within 30 days of the offer or closing/layoff, whichever is later. If a layoff initially announced to be 6 months or less is extended to more than 6 months, it shall constitute an employment loss requiring notice to be given at the time it becomes reasonably foreseeable that the extension beyond 6 months is required, and provided that the extension is caused by business circumstances not reasonably foreseeable at the time of the initial layoff.

3. Notice does not need to be provided at least 60 days before a mass layoff (but must be provided as soon as practicable) when:

   a. **Business is faltering:** This is narrowly construed to instances where the company sought new capital or business to stay open, and giving notice would prevent that opportunity for new capital or business. It only applies to plant closings.

   b. **Unforeseeable business circumstances:** Only applies where closings and layoffs are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required.

   c. **Natural disaster:** Closing or layoff is a direct result of a natural disaster. Note that COVID-19 led to FEMA declaring a major disaster declaration in Michigan on March 27, 2020. Governor Whitmer declared a state of emergency and disaster declaration on April 1, 2020. [6]

C. Steps for assessing whether the WARN Act has been triggered.

1. **Employees must be attributed to a "site":** To determine whether a layoff results in employment loss of 50 or more employees at any "single site of employment," whether considering a plant closing or a mass layoff, is very fact specific. Despite the prevalence of remote work during the pandemic, we have not yet seen this issue play out in court. That being said, there are some regulations and court cases may shed light on the issue.

   a. 29 C.F.R. 639.3(i) provides explanations of what can constitute a "single site of employment" for the purposes of the WARN Act.

   b. Subpart (6) is pertinent to traveling workers and has been applied to certain types of remote workers. Subpart (6) provides that for workers whose primary duties require

[6] A recent settlement was reached in class action suit against Enterprise regarding whether the "natural disaster" exception applied as a defense for violating the WARN Act during mass layoffs due to COVID. The case settled while on partial appeal in the U.S. Court of Appeals for the 11th Circuit. The issue on appeal was whether the district court properly rejected Enterprise's defense that COVID is a "natural disaster" exception under the WARN Act. The appeal was widely considered a test case on the applicability of the natural disaster defense to COVID-related layoffs. See https://news.bloomberglaw.com/daily-labor-report/enterprises-settlement-of-covid-19-layoff-suit-to-pay-175-000

travel from point to point, who are out stationed, or whose primary duties involve work outside of the employer's regular employment sites, the single site of employment for the traveling workers will be: (a) the home base to which they are assigned, (b) the site from which their work is assigned, or (c) the site to which they report. Whether Subpart (6) always applies to "remote workers" is still largely undecided. To qualify for the categories in Subpart (6), however, employees must be "truly mobile." The examples provided in the regulation include railroad workers, bus drivers, and sales persons. Whether remote employees are "truly mobile" requires a more fact-specific analysis. Meson v. GATX Technology Services Corp. and Piron v. General Dynamics Information Technology, Inc. provide guidance as to whether a "remote" employee is "truly mobile" for the purposes of Subpart (6). Based on the analyses in those cases, courts will likely consider the following factors when determining whether Subpart (6) applies to remote workers:

i. Whether employees were remote due to COVID-19 - employees who went remote during COVID-19 will likely be considered to be counted at the office they were working prior to the remote work.

ii. Look to the job duties to see if the single employment site is anchored by responsibilities. For example, remote employees who manage other non-remote employees will likely be counted in the office of the employees they manage. [7]

iii. If the employee does not have a tie to a specific office, the employee will more likely be considered truly mobile for the purposes of Subsection (6). The analysis then turns on whether:

(A) The employee has been assigned a "home base" office;

(B) The employee has an office from which work is primarily assigned; or

(C) The employee has a main office to which they report.

c. Subpart (8) states that "single site of employment" may also "apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of the Act to provide notice is not acceptable." 29 C.F.R. 639.3(i)(8). There have been several public policy debates regarding the purpose of the WARN Act and its implications during COVID-19. Because the WARN Act was intended to give local and state governments time to prepare when a large number of employees might be left unemployed, allowing a

[7] In Meson, the Fourth Circuit held that where and remote employee is a regional sales manager but oversaw two employees in a Virginia office, the employment is not "characterized" by mobility. Instead, she was an employee who "worked out of a fixed office."

company's headquarters to be the *de facto* "single site of employment" for remote workers does not fulfill the purpose of the WARN Act. Therefore, if none of the criteria in 29 C.F.R. 639.3(i) are met, under Subpart (8), an argument could be made that the decision to layoff the remote workers was not done with the intent to evade the purposes of the WARN Act, but was a legitimate business decision such that the remote workers did not constitute a "single site of employment."[8]

D. Notice requirement

1. If notice is required, then the following should be provided to those employees who are considered to have experienced an "employment loss" (which is a termination, other than discharge for cause, voluntary departure, or retirement, that is more than 6 months, or a reduction of hours of work that exceeds 50% for each month during a six-month period).

2. If the employee does not have a representative:

   a. A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

   b. The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;

   c. An indication whether or not bumping rights exist;

   d. The name and telephone number of a company official to contact for further information; and

   e. If utilizing an exception to justify not providing a full 60-days of advance notice, an explanation or statement of that reason.

3. The notice may include additional information useful to the employee such as available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

---

[8] In Piron, the Eastern District of Virginia was tasked with determining whether a group of "remote employees" could be counted as a "single site of employment" for purposes of the WARN Act. The court held that a group of remote employees who worked under a company policy that established clear flexibility for remote work, created a mobile workforce such that the office out of which the remote employees were directed *could* constitute the "single site of employment" for the remote employees. Two things are important to note here: (1) the employees in this case were working primarily for a single contractor out of a single office, (2) the question presented was whether the "remote employees" were a class for the purposes of a class action suit. The court held only that it is possible that the remote employees were all at the same "single site of employment," but that further inquiry into the record was necessary.

4. Additional notices must be sent to the respective dislocated worker divisions for the state and local municipality. If employees are represented by a union, notices meeting separate criteria must be sent to the union representative.

E. Penalties for failure to comply with the notice requirement.

1. If the employer is obligated to provide its separated employees with a WARN Act notice, but does not do so, the penalties for failure to comply include:

a. **For each aggrieved employee (who was employed and did not receive timely notice):** Back pay and benefits for the period of the violation, up to 60 days, but in no event more than half the number of days the employee was employed by employer. This liability for back pay and benefits for 60 days is reduced by any payment of regular wages, any voluntary and unconditional payment by the employer that is not required by any legal obligation, and any payment to a third party (*e.g.*, health insurance premiums or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation. Back pay is calculated at a rate that is the higher of:

i. the average regular rate received by such employee during the last 3 years of the employee's employment; and

ii. the final regular rate received by such employee.

b. **For failure to provide notice to unit of local government:** Civil penalty not to exceed $500 for each day of violation. This penalty may be avoided if the employer pays each aggrieved employee within 3 weeks after the employer orders the shutdown/layoff.

2. If an employee brings legal action to enforce its rights to compensation and benefits, the employee may recover reasonable attorney's fees, if the employee prevails.

3. These remedies are in addition to any other contractual or statutory rights of employees.