Breakfast Bites -

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

Kaitlin A. Brown



Attorneys and Counselors

Maddin, Hauser, Roth & Heller, P.C. 28400 Northwestern Hwy. Southfield, MI 48034 p (248) 354-4030 f (248) 354-1422 maddinhauser.com

f in



Katie Brown

Shareholder, Executive Committee Member **p** (248) 359-6326

f (248) 359-6126 kbrown@maddinhauser.com



Maddin, Hauser, Roth & Heller, P.C. 28400 Northwestern Hwy. Southfield, MI 48034 p (248) 354-4030 f (248) 354-1422 maddinhauser.com

Overview of Objectives

- Identify terms to consider including in severance agreements
- Conduct adverse impact studies to assess and mitigate potential risk
- Determine whether the WARN Act is triggered and how to comply

IDENTIFY TERMS TO CONSIDER INCLUDING IN SEVERANCE AGREEMENTS

 Severance agreements protect employers and ease the transition for employees



Sertain images and/or photos on this page are the copyrighted property of 123RF.com, its contributors or its licensed partners and are being used with permission under the relevant license. These images and/or photos may not be copied or downloaded without permission from 123RF.com.





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

- What is the employee ENTITLED TO RECEIVE, in terms of compensation, bonus, or benefits?
 - Entitled to severance according to a contract?
 - Remaining unused accrued PTO, vacation, or sick time
 - Wages earned through final day of employment
 - Vested benefits



Certain images and/or photos on this page are the copyrighted property of 123RF.com, its contributors or its licensed partners and are being used with permission under the relevant license. These images and/or photos may not be copied or downloaded without permission from 123RF.com



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

- What is the business offering to the employee as <u>ADDITIONAL COMPENSATION</u>, not entitled to receive?
 - Monetary payment (lump sum, pro-rated portion of discretionary bonus)
 - Continuance of benefits?
 - Remaining unused accrued PTO, vacation, or sick time
 - Waiver of negative balance of PTO, vacation, or sick time



- Engaged in any misconduct?
- Outplacement services
- Neutral letter of reference
- How are you characterizing as terminated, resigned, or separated?



мн



- Release of employer
 - Extensive list of employment laws under which claims are being released
 - Specific individuals who should be included in release
 - Effective date

IMH

- Agreement not to sue
- Pending charges or cases that must be dismissed
- Carveout for EEOC or respective government agency charges and investigations
 - Waiver of monetary damages resulting from any such charge filed

- Confidentiality Agreement
 - Incorporate existing agreement?
 - Defend Trade Secrets Act
 - Agreement Confidential
 - Return company property



Certain images and/or photos on this page are the copyrighted property of 123RF.com, its contributors or its licensed partners and are being used with permission under the relevant license. These images and/or photos may not be copied or downloaded without permission from 123RF.com





Restrictive Covenants

- Incorporate exiting agreement?
- Non-competition
- Non-solicitation
- Non-disparagement
- Ramifications upon breach of agreement



ertain images and/or photos on this page are the copyrighted property of 123RF.com, its contributors or its licensed partners and are being used with permission under the relevant license. These images and/or photos may not be copied or downloaded without permission from 123RF.com.



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

- Non-admission of liability
- Incorporate other agreements
- Knowingly and voluntarily agree without duress







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

CONDUCT ADVERSE IMPACT STUDIES TO ASSESS AND MITIGATE RISK

ADVERSE IMPACT STUDIES

- What is an Adverse Impact Study?
 - An analysis of the potential risk associated with both positive offers (*e.g.*, exit incentives, early retirement) and also negative adverse actions (*e.g.*, terminations, temporary layoffs, demotions).



Certain images and/or photos on this page are the copyrighted property of 123RF.com, its contributors or its licensed partners and are being used with permission under the relevant license. These images and/or photos may not be copied or downloaded without permission from 123RF.com.





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

ADVERSE IMPACT STUDIES – THE LAWS & RISK

Title VII

- Applies to employers with 15 or more employees
- Prohibits discrimination based on protected classes of race, color religion, sex, and national origin
- Age Discrimination in Employment Act ("ADEA")
 - Applies to employers with 20 or more employees
 - Prohibits discrimination based on age





ADVERSE IMPACT STUDY – THE LAWS & RISK

- State laws
 - Michigan's Elliott-Larsen Civil Rights Act
 - Applies to employers with 1 or more employee
 - Prohibits discrimination based on religion, race, color, national origin, age, sex, height, weight, marital status
 - Michigan's Persons with Disabilities Civil Rights Act
 - Applies to employers with 1 or more employee
 - Prohibits discrimination based on disability



Certain images and/or photos on this page are the copyrighted property of 123RF.com, its contributors or its licensed partners and are being used with permission under the relevant license. These images and/or photos may not be copied or downloaded without permission from 123RF.com



ADVERSE IMPACT STUDIES – THE LAWS & RISK

ADEA: Protected age?

- Termination of one or more employees under age 40:
 - Reasonable time to consider the agreement
 - NO adverse impact study required
- Valid waiver of age discrimination claim?
 - Termination of one employee age 40+:
 - 21 days to consider and 7 days to revoke
 - NO adverse impact study required
 - Termination of two or more employees age 40+:
 - 45 days to consider and 7 days to revoke
 - INCLUDE adverse impact study

IMH

ADVERSE IMPACT STUDIES – WHAT IS DISCLOSED?

- The adverse impact study must disclose:
 - The unit considered as part of the separation (do not rely on a protected classification, but rather focus on departments, job titles, location, etc.);
 - Each employee in the unit (by position title, not name);
 - The age of each employee in the unit; and
 - Whether the employee was offered severance.

Sreakfast <mark>Bite</mark>s*



Certain images and/or photos on this page are the copyrighted property of 123RF.com, its contributors or its licensed partners and are being used with permission under the relevant license. These images and/or photos may not be copied or downloaded without permission from 123RF.com.



ADVERSE IMPACT ANALYSIS – WHAT IS CONSIDERED?



• Evaluate workforce:

- Group considered
- Group selected
- Demographics of employees
 - Identify relevant protected classes
- Position title of employees
- Department of employees
- Evaluate difference

Certain images and/or photos on this page are the copyrighted property of 123RF.com, its contributors or its licensed partners and are being used with permission under the relevant license. These images and/or photos may not be copied or downloaded without permission from 123RF.com





80% Rule and the EEOC

	Gender	Selected?	Numbers
Name	Female	Yes	10
Name	Female	No	40
Name	Male	Yes	20
Name	Male	No	80

- 20% of women are selected
- 20% of men are selected
- 20%/20% = 100%, which means 80% rule met



80% Rule and the EEOC

	Gender	Selected?	Numbers
Name	Female	Yes	12
Name	Female	No	38
Name	Male	Yes	20
Name	Male	No	80

- 24% of women are selected
- 20% of men are selected
- 20%/24% = 83%, which means 80% rule met
 - This could be expected based on being random; no discrimination

80% Rule and the EEOC

	Gender	Selected?	Numbers
Name	Female	Yes	13
Name	Female	No	37
Name	Male	Yes	20
Name	Male	No	80

- 26% of women are selected
- 20% of men are selected
- 20%/26% = 77%, which means 80% rule NOT met
 - Possible discriminatory motive not just random

Statistical Significance

	Gender	Selected?	Numbers
Name	Female	Yes	16 17
Name	Female	No	34 33
Name	Male	Yes	20
Name	Male	No	80

 Generally, courts accept a .05 p-value (probability value as sufficient to rule out the possibility that the disparity occurred at random



Chi-Square Test

IMH

	Gender	Selected?	Numbers
Name	Female	Yes	10
Name	Female	No	40
Name	Male	Yes	20
Name	Male	No	80

- Overall rate of layoff is 20% (30/150)
- Expected women to be laid off is 10 (20% of 50)
- Expected men to be laid off is 20 (20% of 100)
- Use a website to determine the Chi-Square value to determine significance.

ADVERSE IMPACT ANALYSIS – WHAT TO DO WITH THE INFORMATION?

- List the employees who would be selected based on your criteria.
- Determine whether certain groups of employees are affected more than other groups.
- If certain groups of employees are affected more than other groups, determine if you can adjust your selection criteria to limit the impact on those groups, while still meeting your business's needs.



DETERMINE WHETHER THE WARN ACT IS TRIGGERED AND HOW TO COMPLY

COVERED EMPLOYER

- WARN Act applies to employers who have at least:
 - 100 employees (excluding those who worked less than 6 months in prior 12 months and those working less than 20 hours per week) or,
 - 100 or more employees, including part-time employees who in the aggregate work at least 4,000 hours per week, exclusive of overtime hours

Sreakfast <mark>Bites</mark>

IMH



WARN ACT NOTICE

- Covered employers are required to provide at least 60 days' advance notice when there is/are:
 - Plant Closing
 - Mass Layoff

MH

- Multiple Related Losses During 90-Day Period
- * with a couple exceptions ...



Certain images and/or photos on this page are the copyrighted property of 123RF.com, its contributors or its licensed partners and are being used with permission under the relevant license. These images and/or photos may not be copied or downloaded without permission from 123RF.com.



EXCEPTIONS TO WARN ACT NOTICE

- No WARN Act notice is required when:
 - There is no employment loss
- Notice does not need to be provided at least 60 days before a mass layoff (but must provide notice as soon as practicable) when:
 - Business is faltering
 - Unforeseeable business circumstances
 - Natural disaster



PRACTICAL STEPS FOR ASSESSING WHETHER THE WARN ACT HAS BEEN TRIGGERED

- Employees must be attributed to a "site"
 - 29 C.F.R. 639.3(i) "single site of employment"
- For remote worker:
 - the home base to which they are assigned,
 - the site from which their work is assigned, or
 - the site to which they report.

<u> Treakfast **Bites**</u>

• Do the math.

IMH



pogorelovaolga©123RF.com

Certain images and/or photos on this page are the copyrighted property of 123RF.com, its contributors or its licensed partners and are being used with permission under the relevant license. These images and/or photos may not be copied or downloaded without permission from 123RF.com

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



NOTICE REQUIREMENT

 To those employees who are considered as having 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)



EVALUATE THE POTENTIAL DAMAGES UNDER ANY POTENTIAL LEGAL CLAIM

- If the employee does not have a representative:
 - 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
 - The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated
 - An indication whether or not bumping rights exist
 - The name and telephone number of a company official to contact for further information
 - If utilizing an exception to justify not providing a full 60-days of advance notice, an explanation
 or statement of that reason
- The notice may include:
 - Available dislocated worker assistance
 - If the planned action is expected to be temporary, the estimated duration, if known



OTHER CONSIDERATIONS

- Respective dislocated worker divisions for the state and local municipality
- Union representative



Certain images and/or photos on this page are the copyrighted property of 123RF.com, its contributors or its licensed partners and are being used with permission under the relevant license. These images and/or photos may not be copied or downloaded without permission from 123RF.com.





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

PENALTIES FOR FAILURE TO COMPLY WITH THE NOTICE REQUIREMENT

- 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, LESS:
 - Any payment of regular wages, any voluntary and unconditional payment by employer that is not required by any legal obligation, and any payment to a third party
 - Attributable to the period of the violation
- Back pay is calculated at a rate that is the higher of:
 - The average regular rate received by such employee during the last 3 years of the employee's employment; and
 - The final regular rate received by such employee
- 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.



 Employee may bring legal action to enforce its rights to compensation and benefits, and the employee may recover reasonable attorney's fees.

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





THANK YOU



Kaitlin A. Brown Shareholder, Executive Committee Member p (248) 359-6326 f (248) 359-6126

kbrown@maddinhauser.com



Attorneys and Counselors

Maddin, Hauser, Roth & Heller, P.C. 28400 Northwestern Hwy. Southfield, MI 48034 p (248) 354-4030 f (248) 354-1422 maddinhauser.com

f in.