The Legal Intelligencer



---

# Employment Risks to Consider in a Challenging Economy

Carrie B. Rosen and Emily Simpson-Miller
06-15-2009
Companies operating in these challenging economic times might have to navigate a number of pressing issues in order to weather the storm. Before making hasty employment-related decisions, companies would be wise to analyze the legal ramifications of such decisions, especially when it comes to reductions in force.

This article will address five legal risks that an employer should consider before reducing its workforce.

## The WARN Act

The Worker Adjustment and Retraining Notification (WARN) Act of 1988, 29 U.S.C. Section 2101 et. seq., requires employers with 100 or more employees to provide 60 days' written notice of a plant closing or mass layoff.

A plant closing means the temporary or permanent shutdown of a single site of employment, or one or more facilities within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees. A mass layoff is a reduction in force resulting in the employment loss of 33 percent of active full-time employees and at least 50 full-time employees, or at least 500 employees.

An employer that violates WARN requirements may be responsible for paying 60 days' of back pay to the affected employees, loss of covered benefits including medical expenses, as well as attorney fees if disgruntled employees choose to sue. While statutory exceptions to the notice period do exist — namely, the faltering company defense, the unforeseen business circumstances defense and the natural disaster defense — it is up to the court to determine whether an employer may rely on such defenses to excuse lack of notice.

Moreover, these defenses are considered affirmative defenses, meaning the employer has the affirmative burden to demonstrate that the defense applies to its factual situation.

## State Mini-WARN Statutes

In addition to the federal WARN Act, an increasing number of states and even some municipalities have enacted their own versions of WARN. To date, 18 states already have such statutes on the books, including New York and New Jersey.

These statutes vary in their scope and effect; some cover smaller employers, require greater notice than the federal WARN Act or impose stricter penalties. Employers must ensure that they are complying with both the federal WARN Act and any applicable state and/or local mini-WARN acts before downsizing.

An employer should determine whether it is covered by the act(s), whether its proposed actions fall within the act(s), and ensure that notice is appropriately given to the proper individuals and government units.

## Layoff Selection

Employers' risks do not end after analyzing WARN applicability. An employer must still ensure that the selection of employees to be laid off does not implicate any number of federal, state and local anti-discrimination statutes, including Title VII, the ADEA, the ADA, the FMLA and USERRA.

Employers must be certain that their selection process is clearly defined, objective and not based on an individual's membership in a protected class, including race, gender, age, disability, military status or FMLA use, among other criteria. Managers and supervisors must be able to articulate clear reasons for their selections, and all decisions should be reviewed by a neutral party (whether it be human resources, in-house counsel or another unbiased individual or committee) to ensure that particular employees were not selected on the basis of any discriminatory or retaliatory basis. Further, the selection must not disproportionately affect employees in a particular protected group.

## Whistleblowing Protections

The recently enacted American Recovery and Reinvestment Act of 2009 (ARRA) provides additional legal protection to employees who report suspected mismanagement of federal funds, and companies must be mindful of ARRA protections when selecting employees for layoff.

ARRA makes it unlawful for employers who receive federal funds under the ARRA to fire, demote or otherwise retaliate against such "whistleblowers." While this is not a new concept, the ARRA offers more protection than laws such as the Sarbanes-Oxley Act and the False Claims Act. Rather than limiting protection to people who report suspected fraud, the ARRA extends protection to those who report suspected gross mismanagement or waste, which are fairly subjective concepts.

The ARRA protections cover employees who report their suspicions to an external agency, as well as those who report internally. Internal reporting includes disclosures made "in the ordinary course of an employee's duties" and those made to supervisors and other individuals within the company with "the authority to investigate, discover, or terminate misconduct."

The protected disclosure need not be the sole reason for the employer's action in order for it to run afoul of the ARRA. Rather, the employee must only demonstrate that a protected disclosure "was a contributing factor in the reprisal." The ARRA does not, however, grant whistleblowers absolute immunity from subsequent adverse action by the employer. Section 1553(c)(1)(B) shields an employer from liability if it demonstrates that it would have taken the action in question even in the absence of the employee's protected disclosure.

## Severance Packages and Valid Release of Claims

Employers who decide to offer severance packages in exchange for a legal release of age discrimination claims must ensure that their severance agreements comply with the Older Worker's Benefit Protection Act (OWBPA). To be valid and enforceable, the release must be knowing and voluntary, in writing, specifically refer to rights or claims under the ADEA by name, and be drafted in plain language that the employee will understand. Moreover, the employee must be advised in writing to consult with an attorney before signing the agreement and be given additional consideration in exchange for the release.

If the severance package containing the release of age claims is given to a single employee, the employee must be given 21 days to consider the agreement and seven days to revoke his/her acceptance after signing. If the severance package and release is offered to a group or class of employees, then those employees must be given 45 days to consider the agreement and seven days to revoke acceptance.

Moreover, releases given to a group of employees must also provide the employees with enough information to allow an informed choice as to whether to sign the release. This includes the class, unit or group of individuals covered by the program; any related eligibility factors; the job titles and ages of all individuals eligible or selected for the program; and the ages of all individuals in the same job classification or organizational unit who were not eligible or selected.

## COBRA Subsidy

Employers who make the difficult decision to let employees go should also be aware of recently enacted provisions that make COBRA health care coverage more affordable to displaced workers. These provisions, included in the ARRA, require fast action by employers — and an initial outlay of cash.

The new provisions provide for a federal subsidy of 65 percent of the cost of COBRA for most people who involuntarily lose their job from Sept. 1, 2008, through Dec. 1, 2009. That means the individual only needs to pay for 35 percent of his or her coverage.

Individuals who make more than $125,000 annually, or couples filing jointly with combined income of more than $250,000, are ineligible for the subsidy. Employers initially must pay the remaining 65 percent of the COBRA coverage, which the government will reimburse either directly or through a credit against payroll taxes. Instructions on how to obtain this credit are available at www.irs.gov/newsroom/article/0,,id=204505,00.html.

The good news is that employers are not responsible for determining whether a former employee is eligible — any ineligible person who receives the subsidy will be required to pay income taxes on its value in the following year.

While individuals are entitled to 18 months of COBRA coverage, the subsidy is available only for nine months. Because eligibility is retroactive, otherwise eligible individuals who were terminated on or after Sept. 1, 2008, and declined coverage must be given another opportunity to enroll. Employers were given until May 19, 2009, to notify all employees involuntarily terminated since Sept. 1, 2008, of their right to a subsidy for the cost of COBRA. Any employees terminated between May 19 and Dec. 1 also must be provided this notice. The Department of Labor has posted model notices on its Web site: www.dol.gov/ebsa/COBRAmodelnotice.html. Individuals must enroll within 60 days after the date of receiving this notice.

To avoid future legal challenges, companies contemplating employee layoffs should consult with counsel before making any cuts. Compliance with the myriad of employment laws is not difficult if reductions-in-force are carefully planned and implemented. Spending the time at the outset will save time and money later in defending improperly executed lay-off plans.

*Carrie B. Rosen is a member of the labor & employment practice group at Cozen O'Connor. She counsels management in areas including conducting reductions in force, responding to complaints of employment discrimination, and crafting workplace policies. She can be contacted at crosen@cozen.com.*

*Emily Simpson-Miller is an associate in the firm's labor & employment practice group. She can be contacted at esmiller@cozen.com.*