

Right Sizing the Right Way

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In the midst of the financial difficulties facing so many businesses these days, America's brisk economic growth during the 1990's seems nothing more than a distant memory. Newspaper headlines announcing across-the-board force reductions, both voluntary and involuntary, in the automotive, airline and high-tech industries have become almost common-place. Studies by the Department of Labor's Bureau of Labor Statistics over the last few years reveal that displacement of managerial and professional specialty workers has doubled since the early 1980s. In addition, the data suggests that workers in finance, insurance, real estate, and wholesale and retail trades, face an above-average risk of job displacement.

Force reductions cause many of these displacements. Economic problems, foreign competition, automation, computerization, mergers and the movement of plants and operations to other parts of the country or the world often trigger such "right-sizings." The proliferation of high profile collapses of major employers in the midst of evidence that senior corporate executives have artificially maintained stock prices and the ensuing crises in investor confidence may likewise lead to more lawsuits challenging rightsizing and restructuring.

The displacements caused by force reductions have historically given rise to a proliferation of wrongful discharge lawsuits. However, in the wake of CEO trials and the lawsuits challenging corporate governance (*e.g.*, Enron, MCI WorldCom, Kmart, and Global Crossing) as companies struggle to maintain profit-to-equity ("PE") ratios by streamlining work forces, individuals targeted for reduction-in-force vigorously challenge the need for such force reductions and point to the burgeoning wealth of senior corporate officers, more often than not substantial stockholders with every motive to inflate the worth of company stock by every means possible. These new lawsuits can be particularly dangerous because they now allege fiduciary breach and ERISA violations and often involve long-term employees who have little prospect of future employment in similar capacities and at similar income levels. Moreover, struggling companies typically try these cases before juries, and jurors have little difficulty identifying and sympathizing with long-term employees victimized by force reductions.

Perhaps now more than ever, as employees, shareholders, and clients alike examine corporate governance in a shrinking economy, employers should develop a reasoned framework for rightsizing. Employers should consider voluntary incentives, often contained in ERISA plans, prior to involuntary terminations in order to reduce the potential number of individual lawsuits and/or class action

participants who dispute their selection for layoff or the genuineness of the reasons for the rightsizing.

I. HOW PROBLEMS TYPICALLY DEVELOP

A. Failing To Follow Applicable Policies

Most reorganization-related legal problems arise when an employer implements a force reduction without following its applicable internal policies and procedures. Accordingly, as the first step in implementing any force reduction, the employer should determine whether any of its existing policies and procedures apply to a force reduction and, if so, what needs to be done in order to comply with those policies.

1. Persons other than the policy drafters should take particular care to review, not only layoff policies, but also termination, transfer, severance, separation and benefit policies. Often, employers involve outside counsel and an internal task force, even at this early stage of preparation, in order to preserve privileges and curtail information leaks.
2. Those employers who have implemented internal dispute resolution procedures for employees (such as peer review, arbitration, mediation and the like) should determine whether to subject force reduction decisions to the terms of the procedure.

As the second step, the employer should determine whether to modify or to eliminate any of the policies in light of current conditions.

B. Adverse Impact

Reorganizations also create a host of legal problems if they disproportionately affect one or more protected groups of employees. Before implementing any reorganization plan, an employer should review its workforce as a whole and the employees targeted for layoff or special assignment to determine general demographics of age, race and sex, and to evaluate whether the planned force reduction adversely affects any protected groups to a disproportionate degree.

C. Improper And Inconsistent Layoff Criteria

Implementing reorganizations and force reductions based on improper or inconsistently applied criteria can also lead to serious problems. The employer should create criteria governing the reorganization decisions and should communicate the criteria to the decision-makers and the decision

recommenders at all levels. The employer should also establish a procedure under which persons document compliance with that criteria.

D. Playing The Shell Game

Problems can also arise when employers transfer certain employees to other departments or place them on special assignment during a reorganization to avoid laying them off. The employer should document such decisions as stringently as the decisions to displace employees. Moreover, the employer should ensure that the decision-makers and decision-recommenders adhere to all policies governing transfers or special assignments, such as the posting of open positions or the methodology for approving transfers or special assignments. These moves should also factor into any statistical analysis of the workforce.

E. The "No-Layoff" Practice

Another potential problem may arise if an employer has communicated a “no-layoff” practice in some fashion. Depending on the source and nature of the practice and the degree to which the employer has communicated the practice to employees or to management, the employer may need to issue a written policy or statement clarifying its position with respect to layoffs. Even if an employer has an at-will policy, if employees state that management officials told them that the company has a “no-layoff” policy, a court could hold that such a policy carves out a limited exception to the employer's at-will disclaimer.

F. Failing to Adopt Only the Settlor Role

In order to minimize the risk of benefits litigation in the context of force reductions, the prudent employer should limit its action to a settlor role¹, employ independent counsel to protect attorney-client privileged communications, and maintain employee benefit plans (including welfare plan documents) to insure that a “plan document” does not expand its fiduciary functions.

The Sixth Circuit recognizes that “[t]here is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second.” *Musto v. American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). *See also: Payonk v. HMW Industries, Inc.*, 883 F.2d 221, 231 (3rd Cir. 1989) (Stapelton, J., concurring) (“Under ERISA the roles of plan administrator and plan sponsor are distinct. The plan administrator owes a

¹ The settlor role includes the determinations to confer an employee welfare or pension benefit, to approve its design, and to adopt, modify, freeze, merge, spin off or terminate benefit plans.

fiduciary duty to the plan participants; the plan sponsor, so long as it is not acting as an administrator, generally does not.”).

The Sixth Circuit has upheld the principle that ERISA does not reach business judgment decisions. In *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), the court stated that, “[u]nder ERISA purely business decisions by an ERISA employer are not governed by Section 1104’s fiduciary standards.” *Id.* at 1163. Employer decisions typically exempt from scrutiny under ERISA include: a) the decision to adopt a plan and determine eligibility for participation, levels of benefits and other plan terms; b) the decision to amend a plan (assuming the power to amend the plan is properly reserved to the employer); and c) the decision to merge, freeze or terminate a plan. See e.g., *Sutter v. BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992) (holding that employer’s decision to merge existing plans, to end voluntary contributions, and not to amend plan were business rather than fiduciary decisions, which court could not overturn).

II. PLANNING THE RIGHTSIZING

A. Legitimize and Establish the Case for Rightsizing

To successfully defend or avert rightsizing-related litigation, the employer must establish that a bona fide reorganization and reduction-in-force has in fact occurred. In the past, plaintiffs typically assumed the existence of a genuine force reduction and focused their attack solely on the decision-making selecting candidates for layoff. In light of recent corporate scandals, and perhaps because the courts impose somewhat higher burdens of proof on plaintiffs who sue for discrimination or breach of employment contracts in the context of force reductions, plaintiffs now often challenge the genuineness of the force reductions and their precipitating factors. Although the law protects the integrity of unbiased business judgments, some courts will permit a jury to scrutinize the credibility of an employer’s assertion of economic distress or other rationale for a force reduction. Establishing a case for an anticipated rightsizing may lend credibility to the underlying employment decisions, both for displaced employees and for those who survive the rightsizing, whom potential plaintiffs may subpoena as witnesses in subsequent litigation.

B. Create A Rightsizing Plan With Documented Reasons

Whether the employer will need to defend its rightsizing decisions in lawsuits brought by individuals involuntarily separated or by those who attempt to disavow releases after receiving voluntary incentives, nothing is more difficult to defend than a reduction-in-force without proper documentation. The absence of any paperwork not only suggests ill-

conceived and pretextual decisions, but also probably subjects senior decision-makers to depositions.

Before the employer begins any decision-making regarding who will leave its work force in a rightsizing, the employer should first establish a plan and procedures to document the reasons underlying the decision to reorganize. Such reasons may include the impact on the employer of increased governmental regulation, a decline in its financial condition, changes in product lines, the computerization or automation of certain functions, the loss of significant work, and the like. Recommendations from outside consultants regarding the need to reduce staff and the consequences of failing to do so can help to legitimize the reorganization.

Similarly, before the employer begins the process of selecting employees for displacement in a rightsizing, a task force/committee should review the reasons for the rightsizing and should formulate a plan for the rightsizing consistent with those reasons. For example, if the employer documents that an entire product line has not proven profitable, then the restructuring plan should eliminate the positions within that product line, rather than eliminating another product line simply because the executive responsible for the failing product line has a closer relationship with the CEO.

A rightsizing plan typically establishes the specific criteria and procedures for identifying positions for elimination. The task force/committee typically assists in the selection of these positions, and by extension, of displaced employees. The plan also typically provides for review of the demographic impact of the elimination of particular positions. The restructuring plan may contain a voluntary incentive program followed by an involuntary termination program, with the anticipated savings from voluntary incentives measured against their costs.

To the extent that the employer decides to involve front-line managers in displacement decisions, the employer should consider whether to permit the managers to make recommendations, consistent with the overall rightsizing plan and process, to a senior manager responsible for several areas under consideration. Limiting front-line managers to recommendations only increases the ability of the employer to nullify, through independent investigation by higher level management, any bias or prejudice or favoritism allegedly shown by lower level managers. In addition, such a process limits the number of deponents presented during discovery, should litigation ensue over the rightsizing.

C. Create An Overall Plan to Reduce Expenses

To strengthen credibility with employees who leave as a result of rightsizing and with employees who remain, the employer should establish an overall cost-savings plan to reduce expenses and to improve efficiency before implementing rightsizing. Reorganization plans often include non-personnel related cost-savings measures (e.g., elimination of excessive numbers of outside vendors) as well as personnel-related measures (e.g., salary freezes, reductions in benefits, hiring freezes, the cancellation of club memberships and other entertainment activities, and the like). After the high profile collapses of companies such as MCI World Com and Enron, the reduction of executive perquisites as part of an overall plan to reduce expenses may lend credibility to a corporate restructuring plan. Typically, a plan might include anticipated savings from attrition and from the elimination of unfilled (“open”) positions on organization charts, and not just anticipated savings from position consolidation, position elimination, and outsourcing.

D. Insure Consistency of Actions

Plaintiffs can most easily and effectively attack the legitimacy of a reorganization and force reduction when they can demonstrate that the employer has acted on other fronts inconsistently with the force reduction decision. Problems can arise if an employer tries to reduce its workforce due to purported economic difficulties at the same time that it spends millions acquiring new equipment, companies or processes. While such expenditures may prove crucial to the employer's survival, without a self-serving explanation of the reasons in a reorganization plan, plaintiffs will attack the employer's motives.

For example, during the 1980s, one large Detroit-based company defended several lawsuits following a force reduction that occurred a few months prior to a huge tender offer by that company to acquire a much larger competitor. The financially strapped rightsizing company proffered a leveraged buyout, and the company had to make this strategic move in order to survive in an increasingly compressing industry. The court denied defendants' dismissal motion and permitted the plaintiffs to reach the jury on the theory that the layoffs were a pretext for discrimination: plaintiffs claimed that the tender offer and acquisition proved the falsity of the purported economic motives for the force reduction. The company eventually received a jury verdict in its favor after a lengthy trial, in part because the company could document the financial reasons for the force reduction and the critical importance of the subsequent tender offer to its ongoing strategy of survival.

Other problems with consistency can arise if the actual terminations do not appear to have some connection to the problem(s) addressed by the force reduction. For example, if automation of the employer's purchasing and inventory control functions provides the rationale for a reduction in force, but the employer terminates salespersons simultaneously, the courts may decline to analyze the sales terminations as part of the force reduction, and any attempt to suggest otherwise by the employer will cast serious doubt on the employer's credibility and motives.

III. CREATING VOLUNTARY INCENTIVES

As indicated, the employer should consider offering voluntary alternatives (typically, early retirement incentives or buyout programs) to reduce the need for involuntary terminations in a rightsizing. If the employer has considered but rejected a program of voluntary incentives as too costly, or if the employer has actually offered a voluntary incentive program but the program has been undersubscribed, then the involuntary terminations that follow will appear a "last resort" and therefore more palatable.

A. Determine The Possible Incentives

Some employers maintain severance pay plans and early retirement programs that can serve, with some enhancement, as incentives to nudge employees already contemplating retirement or job change into voluntarily relinquishing their positions. Given the pattern of workforce reductions in the 1980's and 1990's, which commonly offered "early buy-outs," employees often anticipate that such companies will offer such voluntary incentives to reduce the number of involuntary layoffs in a rightsizing. In order to avert the spectre of juries second-guessing rightsizing decisions, and to obtain a more deferential standard of review of those decisions, the company should consider modifying their existing plans, subject to the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"). Employers need to work hand-in-glove with counsel to insure that the plans contain appropriate language to accord the arbitrary and capricious standard of review, meet ERISA standards for intraplan procedures, clearly specify eligibility requirements, and do not appear as permanent modifications of any existing defined pension benefit plans. One advantage to employers in using plans governed by ERISA: assuming that the plan contains appropriate language providing discretion to the plan administrator, courts generally defer to decisions regarding eligibility for the rightsizing program, unless the decisions are arbitrary and capricious. Other advantages include the absence of a right to a jury trial in ERISA cases and the more circumscribed judicial review accorded the plan's administrative proceeding, typically limited to the record made before the plan administrator, absent exceptional circumstances, such as the plan

administrator's failure to apprise employees of the information required for a proper appeal of a denial of ERISA benefits.

Some employers approach the process of reducing the workforce in stages. First, the employer may consider the possibility of offering retirement-eligible employees an incentive to retire early, whether through a supplemental retirement benefit, a severance payment, enhanced medical coverage, social security bridge payments, or some combination of these benefits. Next, the employer may consider enhancing age or years of service for those employees not yet retirement-eligible, and then providing that subgroup of employees with incentives to retire. Third, the employer may consider enhancing severance pay programs for non-retirement-eligible employees, and enhancements for such voluntary severance programs could include lump sum payments, payments over time, company-paid COBRA premiums, outplacement services, and the like.

Employers worried about losing key employees through such programs can retain the right under their ERISA-governed rightsizing plans, in their business judgment, to exclude certain key segments of the workforce or even specific key employees from eligibility for the incentive program, so long as there is a nondiscriminatory reason for the exclusion.

B. Review Existing ERISA Plans

Often, employers will have an ERISA plan in place, such as a severance pay plan (an employee welfare benefit plan) or a retirement plan with early retirement provisions (an employee pension benefit plan).

Typically, an ERISA-governed employee benefit plan contains objective eligibility criteria less susceptible to challenges of bias or pretext. For example, eligibility for early retirement generally turns upon age and years of service, often 55 years of age with 10 years of service. Permitting an enhancement of objective factors such as age and years of service may also secure cost-savings with a lower risk of litigation. ERISA does not compel the employer to provide employee benefits of any sort, particularly contingent benefits such as early retirement benefits; therefore, the provision of such benefits to a wider group of eligible employees than an ERISA-governed pension plan originally requires should serve as sufficient consideration for the agreement of such eligible employees to take early retirement. The employer may cost out voluntary incentives and discover that simply by permitting those 54 years of age to "age in" and/or by according those 55 years and older with nine years of service one more year of credited service will provide a significant cost-savings, if early retirees subscribe to the program in sufficient numbers, thus obviating or reducing the need for involuntary terminations.

One caution: when the eligibility standards appear subjective, as where an employer determines a key employee otherwise eligible for a voluntary incentive ineligible because of business necessity, the employer may wear two hats: one as employer and one as plan administrator. Under those circumstances, the courts may subject the decision of the plan administrator/employer (who, as employer, stands to gain by deeming the employee ineligible for the voluntary incentives) to a higher standard than the deferential “arbitrary and capricious” standard generally applied to decisions by plan administrators.

Under ERISA, the decision to adopt a particular ERISA-governed early retirement incentive benefit or an employee welfare benefit (such as severance) belongs to the employer in its settlor role. ERISA should preempt any state-law analysis to the contrary. Courts hold that employers creating such benefits are engaged in a “settlor function,” one not subject to suit for breach of fiduciary duty. Thus, such a decision to adopt particular benefits remains essentially a business judgment insulated from judicial review unless a conflict of interest arises. Because ERISA preempts state-law claims “relating to” an ERISA plan, employers can often move to dismiss such claims and/or remove such claims to federal courts, generally more familiar with ERISA analyses and more inclined to dismiss such claims as preempted. To the extent that the court declines to do so, employers can argue that the claims, properly characterized as ERISA claims, nonetheless should be dismissed under the deferential standard of review discussed above.

C. Clarity of Vision Before Drafting Plans

Lawyer-Client Partnering Pointer: To keep costs lower, an employer should have a clear sense of the reasons for the corporate restructuring and should have made at least made a preliminary determination of the levels of its work force that the rightsizing will affect. If lawyers must draft and redraft plan documents because the employer changes the design of the corporate restructuring, then it becomes more costly for all involved, including managers who must revise documents in support of restructuring.

IV. IMPLEMENTING VOLUNTARY INCENTIVES

A. Adopting The Voluntary Incentives

1. Consistent Corporate Governance

The employer should follow whatever means it employs to confer benefits upon employees as a matter of corporate governance. For example, if a corporation has delegated decisions about the

provision of benefits to an employee benefits committee, that committee should adopt a resolution recognizing that the employer has created certain voluntary incentives for a particular period of time or otherwise reflect the creation of such incentives in committee minutes. To further illustrate, if the employer has traditionally adopted benefits through Board resolution or through an action of a “Compensation Committee” or through a Human Resources policy (with the power to adopt the policy delegated to the appropriate Human Resources person or committee), then the employer should consider a similar Board resolution or committee action or policy for voluntary special incentives.

The employer should take care to avoid “leaks” about such special incentives before the official dissemination to affected employees. The creation of a task force, and adherence to procedures similar to those used during the collective bargaining process (*e.g.*, the recapture of all drafts) may assist in maintaining confidentiality.

2. Adapting Existing ERISA-Governed Plans

Some companies maintain published ERISA-governed pension and/or severance pay plans containing eligibility provisions that contemplate layoff due to corporate restructuring or outsourcing. In such cases, a “Statement of Material Modification” (the “SMM”) may contain additional qualifying eligibility criteria for a specific window period for a specific product line or group of employees, as well as enhanced incentives (*e.g.*, outplacement, COBRA reimbursement, greater severance than that provided under a corporate severance pay program, if any) in exchange for a general release. If the existing plans do not contain a key employee provision, then the SMM should also contain such a provision. At a minimum, the SMM should be disseminated to affected employees, with the affected employees acknowledging the date of its receipt.

Companies contemplating rightsizing should permit counsel to review existing plans in order to determine whether the plans contain a sufficient articulation of eligibility criteria to permit the addition of special conditions, enhanced benefits, and a specific window period by SMM. Counsel should also draft and/or review the SMM to conform to the eligibility criteria set by the employer.

If the existing plan has not incorporated language according the plan administrator wide discretion in interpreting and construing plan provisions, or if the plan has not incorporated the business judgment rule, the SMM could include such language. [CAVEAT:

In that case, counsel may also recommend amendment of the basic plan document.]

The document by which the employee relinquishes employment and accepts the voluntary incentives (typically along with a release) should contain language reciting the employee's acknowledgement that, in reaching his/her decision to accept the incentives, [s]he has not relied upon any company representations other than the statements in the plan document, and that [s]he has not relied on any oral or written representations by any director, officer, stockholder, employee, associate, agent, representative, fiduciary or other representative of the company. The employee should also further acknowledge his or her awareness that the employer may, in the future, offer similar or better employee benefits than the benefits described in the plan, and the employee should nonetheless agree that [s]he enters into the agreement freely and voluntarily after consultation with counsel and acceptance of the incentives.

3. Enhancements Not Governed By ERISA

Occasionally, an employer may wish to offer certain one-time-only benefits in exchange for a general release of claims and voluntary resignation. For example, the employer may offer a lump-sum to reimburse an employee for some or all of the cost of COBRA continuation coverage, or may offer a lump-sum severance payment in two lump sum payments in order to straddle two tax years for the employee. However, the employer should understand that the DOL and/or IRS could deem a continuing stream of installment severance payments over a two-year period a pension benefit, with appropriate tax consequences on the distribution.

4. Types of Voluntary Incentives

The employer can offer a wide variety of severance and benefit incentives to encourage attrition from its work force in order to reduce the number of involuntary terminations during a corporate rightsizing.

The following list includes a few examples of cash-related enhancements to existing benefits that can serve as consideration for an employee's voluntary relinquishment of his or her job and for the signing of a general release of claims:

- a. An enhanced severance payment based on years of service.

- b. An enhancement to deferred compensation.
- c. A supplemental pension benefit. (Such a voluntary incentive will require an amendment to existing pension plans and will need to comply with ERISA).
- d. A special allocation to the profit-sharing plan. (Such an incentive will also require an amendment to existing plans and will need to comply with ERISA).

On the benefits side of the equation, an employer may consider a number of options available, such as:

- a. A continuation of health benefit premium payments for all or some portion of the COBRA period of 18 months.
- b. A continuation of health benefits beyond 18 months for a specified period of time for those former employees who have not found other employment and benefit coverage or become Medicare-eligible.
- c. A continuation of life insurance benefits, provided that the employer's carrier will permit a continuation of benefits to a non-employee. This option will involve ERISA and possibly tax code implications.
- d. An extension of other company-paid benefits to the extent that the plans permit these benefits to non-employees.
- e. An extension of outplacement services, tailored to particular levels of employees. The cost can be quite high on a per-employee basis and may reach \$5,000 and \$10,000 for high level employees, depending on the services provided.

B. Disseminating Information To Eligible Employees

Prior to implementing or announcing voluntary incentives as part of a rightsizing program, the employer should establish a standard procedure for advising employees eligible for rightsizing incentives. If the employer handles the informational aspect of the process well from a human relations standpoint, less litigation should result.

The employer should provide packages of any severance pay programs or supplemental retirement programs, along with any releases sought in connection with a separation package, to the affected employees at the time they learn of their displacement (whether by meeting or individual conference); and human resources, benefits and/or outplacement personnel should immediately meet with employees to answer questions about the documentation and the benefits being provided. The employer should include a question and answer sheet covering the most obvious inquiries in any materials provided to the employees. Some employers have also established toll-free telephone numbers or e-mail addresses where inquiries can be made.

Should the employer choose to notify affected employees in a group meeting, the employer should not provide employees with any specific reasons for the decision to offer voluntary incentives at the meeting. Rather, the employer should give a general statement that: 1) while the employer offers completely voluntary incentives at this time, the incentives remain just the first step in a corporate restructuring for economic (or other) reasons; and 2) after the window of opportunity for electing incentives, the employer may need to reduce its work force further.

The provision of general (rather than specific) information helps to avoid inconsistencies and misstatements by the individuals conducting the meetings and provides the company with the widest possible leeway in explaining its decisions should litigation ever result. The employer should avoid discussions of the selection of particular employees for voluntary incentives during such meetings, but should refer employees to the plans in their packets containing eligibility information.

Similarly, if the employer chooses to inform displaced employees during individual meetings, the employer should refer employees to the sections in their plan documents regarding eligibility for incentives, and to the question and answer sheets provided with the plan.

Whether an employer informs its affected employees in groups or individually, problems inevitably arise when employer representatives say too much during such meetings, because inconsistencies develop between actual events and what employees were told about the reasons for their becoming eligible for incentives.

C. Disseminating Information To Managers

Immediately prior to the group or individual meetings at which the employer offers eligible employees the voluntary rightsizing incentives, the employer should communicate to all management employees in a written memorandum and group meeting the adverse conditions which led to the

decisions to create the voluntary incentive program, as well as the measures that the company has taken and will take to offset the adverse effects. Management must understand that they must not pressure anyone to elect an incentive or suggest that adverse consequences will flow from a decision not to elect it. The employer should direct managers not to answer questions about the program or give opinions on whether an employee should participate in the program, but should direct all inquiries to the designated person in HR or the hotline.

D. Releases In Exchange For Incentives

If the employer decides to offer an incentive package or payment as an inducement to leave voluntarily, it should attempt to obtain a release of all claims from the employee. The Older Workers Benefit Protection Act (“OWBPA”), found at Title II of the federal Age Discrimination in Employment Act (“ADEA”), provides strict rules governing the release of claims of age discrimination. Age discrimination claims are the most common claims that arise from rightsizing, so a failure to comply with OWBPA can prove costly from the employer's standpoint.

Although many of OWBPA's requirements have existed in other forms at common law, some of its requirements go much further. According to OWBPA, courts will not consider a release "knowing and voluntary" and will not enforce a release as to ADEA claims unless it meets the following minimum criteria:

1. The release must be in writing and written in a way calculated to be understood by the individual to whom it is given;
2. The release must specifically refer to rights or claims arising under the ADEA;
3. The release cannot require the waiver of any rights that may arise after the date the release is executed;
4. The release must provide valuable consideration to the employee that is in excess of what the employee is otherwise entitled to under the employer's policies;
5. The employee must be advised to consult with an attorney; and
6. For a “program” (defined under OWBPA as 2 or more employees), the release should state that the employee can take up to 45 days in which to consider the release and an

additional 7 days after signing the release to revoke it. In addition, the employer must supply the affected employees with certain demographic information about the employees covered by the program. Specifically, the employer must provide written information about the eligibility requirements for such a program and lists of the job titles and ages of all employees eligible and not eligible for the program. The lists do not have to include the names of the employees.

The disclosure requirements, that the employer inform the individuals from whom the waivers are sought as to the eligibility requirements for such a program and lists of the job titles and ages of all employees eligible and not eligible for the program, are aimed at enabling the terminated employees to decide whether to sign the waiver or to instead reject the proffered separation benefits and pursue an age discrimination claim instead. A question that has often arisen with respect to nationwide reductions in force is whether the employer must provide that information for its business companywide, or whether the company can instead provide that information for only those individuals affected in their geographic area. This issue was recently addressed in *Burlison v. McDonald's Corporation*, 455 F.3d 1242 (11th Cir. 2006), where the court ruled that an employer undertaking a nationwide reduction-in-force was only required to give terminated employees the specified information about their own "decisional unit," as opposed to nationwide information.

Each of the five named plaintiffs in *Burlison* worked for McDonald's Corporation for about fifteen years before McDonald's terminated their employment in 2001 as part of a nationwide restructuring. McDonald's offered its terminated employees severance packages in exchange for signing a release waiving all claims against the company. In an effort to comply with OWBPA, McDonald's included *region*-specific information with the releases. The information provided listed the ages and job titles of the employees who were discharged and those which were retained, but only with respect to the relevant regions (Atlanta/Nashville/Greenville). The plaintiffs accepted the packages and signed the releases, but nevertheless sued McDonald's in 2003, alleging that they were terminated because of their age. The plaintiffs claimed that the releases they signed failed to comply with OWBPA because they did not include disclosure of nationwide information about the terminations, and that the releases therefore were no bar to the lawsuit.

The key issue in the case was whether McDonald's complied with the OWBPA by limiting each employee's disclosure to information concerning the relevant region, rather than including nationwide data. In addressing this issue, the court noted that regulations promulgated by the Equal Employment Opportunity Commission state that the scope of the group covered by a termination program under the OWBPA is determined

by examining the “decisional unit” at issue. The EEOC defines a “decisional unit” as “that portion of the employer’s organizational structure from which the employer chose the persons” who would be offered the waiver and those who would not. 29 C.F.R. §1625.22 (f)(3)(i)(B). The court in *Burlison* endorsed the EEOC’s approach, recognizing that OWBPA’s underlying purpose is to provide employees with “appropriate data to conduct meaningful statistical analyses” as they consider whether or not to waive their legal rights. Extending information beyond the decisional unit would make the data more confusing and discriminatory patterns harder to detect, effectively diminishing the utility of the information. The court concluded that employees must be informed about “those who were considered for jobs in the same process as the terminated employees.” The court confirmed that McDonald’s acted appropriately in this instance and dismissed the plaintiffs’ ADEA claims on the basis of the releases that they had signed.

E. Timing of Voluntary Exit Incentives

From a legal standpoint, it makes sense to conclude any voluntary program before making involuntary layoff decisions. If the employer begins to make decisions about involuntary terminations at the same time that employees are given voluntary severance options, a company risks a claim by disgruntled former employees that they felt coerced into accepting the voluntary program because of fears that the employer would target them for the involuntary layoff. Under OWBPA and common law principles relating to the enforceability of settlement agreements, such claims might diminish the effectiveness of any releases obtained as part of the voluntary program.

V. INVOLUNTARY FORCE REDUCTION PLANNING AND IMPLEMENTATION

A. Structuring The Decision-Making Process

As indicated previously, the employer should establish specific procedures and guidelines in implementing its reorganization and force reduction. The existence of such procedures and guidelines lends some degree of consistency to the decision-making in different departments and avoids the appearance of arbitrariness.

1. Create a Decision-Maker Committee

The structure of the decision-making process starts with a determination of who should be making the force reduction decisions. Selecting decision-makers may not be difficult in companies organized into specific departments, groups or divisions with clear lines of authority. The selection process is more difficult

in organizations that have considerable dotted line reporting across departmental lines.

The decision-makers should be sufficiently high up in the organization to make informed decisions about departmental priorities and functions. At the same time, however, the decision-makers must have sufficient knowledge of the day-to-day operation in order to make informed decisions about specific people. In some large departments or groups, it may be necessary to involve individuals somewhat farther down organization chain, who can make initial recommendations regarding displaced positions/employees, so that the decisions made about specific lower level employees appear informed by actual knowledge of the employee in question.

The employer should charge the same task force that oversaw the voluntary incentive program with the responsibility of overseeing the involuntary force reduction.

2. Review the Corporate Layoff Policy

The task force, advised by outside counsel for privilege considerations, should establish a formal written corporate layoff policy, if such a policy does not already exist. It should also review each step in the layoff procedure for legal ramifications and compliance.

3. Document Economic Justifications and Other Means Tried

The task force should also further sophisticate the economic justifications for the involuntary force reduction, indicating whether and in what areas the voluntary incentives did not achieve the subscription hoped, and indicating what further alternate means the company employed in order to avert the force reduction (*e.g.*, hiring and promotion freezes, attrition, reduced work weeks, pay cuts, restrictions on travel, consolidation of functions, etc.). The task force may also consider documenting alternative expense reduction measures used by other companies but unlikely to improve the company's current circumstances. The task force may wish to retain outside experts (such as accounting firms, again employed through counsel, to insure privilege until the company wishes to waive the privilege) to support the company's rationale for the force reduction.

4. Monitoring Hiring, Promotions, Salary Increases

The task force should monitor hiring before the force reduction, imposing a hiring freeze (typically prior to the voluntary incentive offerings). If practical, the hiring freeze should remain in effect for one year following the force reduction.

Similarly, the task force should monitor promotions and salary increases. Ideally, the company should freeze salaries, where practical. The company should also freeze promotions for six months, if practicable, and the task force should monitor promotions so that employees do not receive promotions into positions slated for the force reduction.

5. Prepare Written Analyses of Job Functions and Positions

A rightsizing plan may require that each departmental or unit decision-maker conduct a written analysis of the job functions and positions in his or her department. This written analysis may help the decision-maker focus on the future needs of the reorganized department. The reorganization and any force reduction that results should be geared toward future needs and objectives, not toward purging unwanted employees.

Form A, attached at the end of these materials, is an example of the sort of documentation that decision-makers may generate in conducting written analyses of their departments. The written analysis of job functions and positions should prioritize the functions and/or positions that will exist in each department after the force reduction and outline the proposed changes to be made in the reorganization in order to accomplish this plan. Decision-makers may use the bottom half of Form A and additional sheets to outline in detail their rationale for any proposed changes in their respective departmental organizations. Specifically, decision-makers may discuss in detail any restructuring of job responsibilities and titles that will occur, any new positions anticipated, and any positions eliminated or consolidated as a result of the reorganization. The decision-makers may also address any outsourcing of functions in Form A. Finally, decision-makers should include a discussion of the reasons for the reorganization decisions.

Following Form A (or a similar process) forces decision-makers to analyze their departments as a whole, to prioritize their needs and to justify their reorganization decisions. Form A provides the blueprint for how the department will operate with a reduced staff. In completing Form A, decision-makers should ask questions such as: What are the essential functions that the division must perform following the force reduction and how should these be

prioritized? How can retained staff perform these functions performed efficiently and effectively? What low priority functions can be consolidated, modified, limited or eliminated in the future? Can certain functions performed by the department be outsourced? How many employees will be needed to perform each essential function or position of the department? What positions can be restructured so as to accomplish functions more efficiently?

The methodology outlined in Form A is extremely valuable from a legal standpoint in that it demonstrates that decision-makers were focusing not on people in reorganizing their departments, but rather on future departmental needs and job priorities.

6. Prepare Written Analyses of Required Skills and Abilities

Once the decision-makers have completed the job analysis outlined in Form A, they should then create a written record of the positions, by name, which will exist in the reorganized department and the skills and qualifications necessary to fill those positions. **Form B** is an example of a document that can help to create this record.

Form B asks decision-makers to describe the skills, abilities and other qualifications necessary for each listed position, including job prerequisites or educational requirements. For example, if an accounting supervisor position in Finance requires, among other things, prior experience as an accountant and a BS in Finance or Accounting, Form B should contain this information.

When they have completed the listing of positions, skills and qualifications, the decision-makers should review the list to determine which existing employees, if any, are best qualified to fill the positions that will exist in the future. Following this procedure may insure that personal considerations do not bias decisions regarding departmental reorganization and structure. Again, decision-makers should focus more on the question of “who can best fulfill the needs of my department,” rather than “who do I want to get rid of?”

In identifying these retained employees, the decision-recommenders, the decision-makers and the review committee should triple check to make sure that the number of employees listed matches the Form A determination of how many employees will be necessary to perform each departmental function. Decision-makers and/or decision-recommenders should also include in the space

provided a narrative statement of why the employees listed have been selected to fill the positions in the reorganized department.

7. **Selection Criteria**

A critical part of the decision-making process in any involuntary force reduction, the selection criteria considered in displacing employees should pass muster as objective and related to business needs.

a. **Best-Qualified versus Best Performer**

Unless company policy dictates otherwise, a company may choose to select the best qualified individuals to fill the positions that will exist in departments after the reorganization. **Form B**, discussed below, presumes use of a “best-qualified” standard and requires modification if the company chooses a different standard.

To the extent that the company decides to use relative performance as a factor in retaining employees, the selection process should exercise considerable care, because the use of relative performance as a selection criteria is often fraught with hidden problems. Employers often learn during reorganizations that their existing written evaluations of employees are problematic due to inconsistently applied standards or ratings, missing evaluations, or the tendency of performance evaluators to rate their employees as acceptable or above for purposes of salary increases, regardless of actual performance. Litigation often results when flawed performance evaluations serve as the sole or a key selection criteria. Thus, although companies may turn to performance evaluations as one measure of a candidate’s qualifications, they should not serve as the only measure of the need for the qualifications exemplified by the employees retained. Of course, the determination of best-qualified employees to retain should not contravene the observations, ratings and conclusions in existing performance evaluations.

Objective indicators of performance generally prove the safest measurements of performance to defend, particularly in cases of flawed performance evaluations. Decisions based on skills, qualifications and experience, however, can avoid the pitfalls of focusing on past performance.

Another selection method employers use, particularly when numerous identical jobs remain after force reduction, is a forced ranking system. Forced ranking involves the rating of employees on a graded scale, starting with the "best" employee, then the "poorest" employee, followed by the "second best" employee, then the "second poorest" employee and so on. Outside consultants have also created computer-assisted models for merit-based decision-making that compile and correlate the responses of evaluators to a series of questions.

b. Length of Service

Unless existing policies state otherwise, an employer may consider length of service as a selection criterion. A company will retain more flexibility if it uses length of service as a tie-breaker in cases of equal qualifications. An overall assessment of experience provides a far better indicator of ability than length of service.

If the company does decide to use length of service as a tie-breaking factor, all departments should consistently use length of service in that manner.

c. Salary and Benefit Levels

Employers should not consider salary and benefit levels in determining which employees to terminate, transfer or place on special assignment in the reorganization. Such consideration breeds claims of age discrimination because high salaries and benefits usually go to longer serving employees, who remain by and large older. ERISA also contains an anti-discrimination provision, and Section 510 (29 U.S.C. §1140) increasingly appears as the basis for class actions claiming that employee benefit cost avoidance drove decisions to terminate employees or to engage in force reductions at particular plants or in particular product lines where the workforce engenders significant employee pension and welfare benefit costs.

8. Prepare Written Termination and Retention Summaries

After the decision-makers have reviewed the recommendations of front-line managers and have completed their written analyses of the reorganization of their respective departments, they should provide to the Human Resources

Department summaries of those individuals retained and those individuals separated/displaced. Examples of these summaries, entitled "Termination Summary Sheet" and "Employees Retained Sheet" appear as **Forms C and D** attached to these materials. The Human Resources Department, not the decision-makers, should then determine and record the age, race and sex of retained and displaced employees. The task force should then arrange to audit this information, so that any necessary statistical studies can be conducted.

9. Prepare Written Employee Separation or Displacement Records

Decision-makers should also prepare a written statement regarding each separated employee that discusses in detail any factors considered by the decision-maker in selecting a specific employee for separation or displacement. An example of such a form is attached as **Form E**. Please keep in mind that more than one reason will often apply to decisions about specific individuals. It is important that decision-makers provide sufficient detail in the narrative section of the form, and on additional sheets as necessary, to describe the bases for their decisions. If a decision-makers have relied on the lack of certain job prerequisites or educational background in not selecting a particular individual, these should be specified. To the extent that decision-makers have relied on comparisons of qualifications between individuals, the decision-makers should discuss the nature of the comparison and the identity of the employees compared, along with the rationale for their conclusions about the comparisons.

10. The Need for a Written Record

The written materials prepared by the decision-makers (and decision-recommenders) constitute the written record documenting the analysis and factors considered by the decision-makers (and decision-recommenders) in reorganizing their departments and in selecting specific individuals for termination or special assignment. These written materials serve several purposes:

- a. As indicated above, the written materials provide a uniform mechanism that forces decision-makers to use a proper analysis in reorganizing the workforce prior to implementing any layoffs or special assignments.

- b. The written materials provide a record of the analysis utilized by the decision-makers in case the employer's legal counsel must refresh memories in the event of subsequent litigation.
- c. In the event of litigation, these documents can also serve as valuable, self-serving exhibits that demonstrate the careful, logical and unbiased procedures used in making the decisions that effectuated the reorganization.
- d. The use of a standard set of forms helps to guide decision-makers and promotes consistency in decision-making across departmental lines.
- e. Written materials facilitate a review of the decision-making process and can be changed or amended, when necessary, prior to the implementation of any decisions.

As discussed below, the company and outside counsel should carefully review these documents before the reorganization takes place to insure that no unlawful decisions have been made.

B. Reviewing The Reorganization Decisions

1. Use a Review Committee

Once the departmental decision-recommenders have completed the written analysis discussed above and have selected the individuals for layoff or displacement, a review committee should review and approve these decisions. The review committee should remain small and composed of two to four individuals occupying positions at higher levels of management. In addition, the review committee should include outside counsel, who can play a devil's advocate role. The presence of outside counsel can help to insure an impartial review and place the imprimatur of legal approval on the decisions, thereby minimizing the possibility of liquidated damages awards should litigation occur. In addition, the presence of outside counsel will enable the company to keep the deliberations of the review committee confidential in subsequent litigation.

Each decision-maker should meet with the review committee and outside counsel to defend his or her reorganization, personnel and termination/displacement recommendations. At this time, the review committee and outside counsel can also carefully review the

documentation supporting the decisions made in each department. If any problems surface, or if decision-makers have left significant decisions unexplained or inadequately explained, the committee can suggest the revision or augmentation of documentation at this point.

The review committee should consider displaced employees for any vacancies in other departments, including those transferred or placed on special assignment. This procedure can avoid the frequently troublesome problem of hiring new people shortly after a reorganization to perform jobs that laid off employees from other departments could perform.

The review committee should play a role in determining the transfers or assignments of displaced employees not yet laid off. Depending on the nature of these transfers or special assignments and the reporting structure relative to them, the review committee can recommend placement for a displaced employee, or a committee of the managers or department heads who will be responsible for supervising the employees transferred or placed on special assignment may so recommend. Another form similar to the "Employee Termination Record" attached as Form E should describe the reasons for the decision to match the employee with a particular special assignment. The review committee should become more actively involved in any transfer or special assignment decisions because the members of that committee will have a broader view of the company as a whole and can better assess its needs across departmental lines.

Once the review committee accepts the recommendations of the departmental decision-makers and decides which employees will be transferred to new departments or separated/displaced, these recommendations become final following the outcome of a statistical analysis of the workforce data.

2. The Statistical Analysis

The final step in reviewing the force reduction involves the use of an expert to conduct a statistical analysis of the employees to be terminated or placed on special assignment. This analysis should occur after all termination and transfer decisions have been made but before the implementation of any of these decisions. Forms C and D will provide the expert with much of the information necessary to conduct the analysis.

Conducting the statistical analysis may insure that the decisions, both by department and in the workforce as a whole, do

not reflect a disparate impact on any protected group. If the statistical analysis indicates no disparate impact, then the termination or displacement decisions become final, and the reorganization can be implemented. If the statistical analysis presents any concerns, however, outside counsel and senior management must immediately review the situation before the employer takes any further actions.

C. Disseminating Information

1. Advising Employees

Prior to implementing or announcing the force reduction, the employer should establish a standard procedure for advising the displaced employees. Severance pay packages, supplemental pension benefits and outplacement services may ameliorate the employee upheaval generated by a force reduction. As discussed above in Part IV.B. in connection with voluntary incentives, the employer should provide packages of information on any such programs, along with any releases sought in connection with a separation package, to the involuntarily displaced employees when the company informs them of layoff, transfer or special assignment. Again, human resources, benefits and/or outplacement personnel should can then meet with employees to answer questions about the benefits being provided. A question and answer sheet covering the most obvious inquiries included in any materials provided to the employees should reduce the questions asked.

Two individuals should attend the individual meeting to advise an employee of his or her separation or special assignment. They should not provide the employee with any specific reasons for the decision to terminate or reassign at this meeting, other than a general statement that a companywide reorganization is occurring and that the workforce is being reduced for economic (or other) reasons.

As with a voluntary reduction, the information provided to involuntarily displaced employees should remain general to avoid inconsistencies and misstatements by the individuals conducting the meetings and to provide the company with the widest possible leeway in explaining its decisions should litigation ever result. The employer should avoid discussions of the selection of particular employees and should direct employees to their plan documents and related documents supplied in their packets.

2. Prepare a Written Record of the Termination Meeting

The managers in attendance should prepare a written summary of the meeting with the employee. People occasionally make helpful admissions during these meetings that defense counsel may use to the employer's advantage in the event of subsequent litigation. In addition, the written summary can help to rebut any inaccurate allegations made by the employee about what was said during the meeting. Once again, the employer should prepare a specific form for use by managers in recording this information. **Form F**, entitled "Termination Meeting Report Form," is an example of such a form.

3. Meet with Decision-makers

As with a voluntary incentive program, the employer should provide a written memorandum (capable of becoming "Exhibit 1" at a trial) of the reasons for the force reduction to all decision-makers. At a group meeting, held prior to the implementation of the reorganization procedures discussed above, the employer should explain both the reasons for the reorganization and the process to implementing the reorganization. At this meeting, the employer may emphasize that illegal factors cannot be and will not be considered in reorganizing the workforce. Outside counsel may attend to answer questions about the process and to provide the imprimatur of good faith and impartiality to the process.

VI. OTHER CONSIDERATIONS

A. Recall

Employers need to determine whether or not employees terminated as a result of the reorganization will remain eligible for recall and, if so, under what circumstances. If the employer decides to implement a recall policy, it should determine its eligibility requirements for recall and should explain those to both the decision-makers and the affected employees. The employer should consider how it will deal with issues such as:

1. Recall based on skills and qualifications versus length of service;
2. Recall by department or companywide;
3. Length of time employees remain eligible for recall;
4. Manner in which a laid off employee can be removed from the recall list;

5. Who at the company will contact laid off employees regarding recalls and by what means;
6. Order of recall;
7. Whether recall will be automatic as positions become available or whether interviews will be required, thereby giving the employer the ability to choose among laid off employees eligible for recall; and
8. The manner in which written records will be made of the recall process.

B. Severance And Other Termination Benefits

The same guidelines discussed earlier in this paper in connection with voluntary severance programs are equally applicable to involuntary severance programs.

C. Plant Closing Legislation

Once the employer establishes the size and scope of the reorganization, the employer must determine its obligations under the Worker Adjustment and Retraining Notification Act (WARN). The WARN Act is a relatively complex piece of legislation. It is not the purpose of these materials to discuss the WARN Act with any specificity. Nonetheless, employers should be aware of the following general provisions:

1. Notice Requirement

The WARN Act requires that employers of 100 or more employees provide 60 days of advance notice of a “plant closing” or “mass layoff” to affected employees (including part-time employees), bargaining unit representatives, the state’s dislocated worker unit, and local government officials. 29 U.S.C. § 2102; 20 C.F.R. § 639.6.

2. “Plant Closing”

The WARN Act defines a “plant closing” as “the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units of a single site of employment,” provided that “an employment loss” occurs during any 30-day period of at least 50 or more employees, excluding part-time employees. 29 U.S.C. § 2101(a)(2); 20 C.F.R. § 639.3(b).

3. “Mass Layoff”

A “mass layoff” results from an employment loss at a single site of employment during any 30-day period of (1) at least 33% of the employees, excluding part-time employees, **and** at least 50 employees; **or** (2) at least 500 employees, excluding part-time employees. 29 U.S.C. § 2101(a)(3); 20 C.F.R. § 639.3(c).

4. Aggregation of Separate Groups

The WARN Act will aggregate employees laid off at different times within any 90-day period in separate groups too small to reach the minimum numbers for a plant closing or mass layoff, in determining whether a plant closing or mass layoff has occurred, unless the layoffs “are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements” of the WARN Act. 29 U.S.C. § 2102(d); 20 C.F.R. § 639.5(a).

5. “Employment Loss” under the WARN Act

An “employment loss” occurs if: (1) an employee is terminated for any reason other than a discharge for cause, voluntary resignation or retirement; (2) an employee is laid off for a period exceeding six months; or (3) the employee’s hours of work are reduced by more than 50% during each month of any 6-month period. 29 U.S.C. § 2101(a)(6); 20 C.F.R. § 639.3(a)(f)(1).

6. Exclusions from an Employment Loss

There are two exclusions from the definition of an “employment loss.”

a. Sale of Business Exclusion

The first exclusion relates to the sale of all or part of an employer’s business. If a sale occurs, the seller remains responsible for providing notice of any plant closing or mass layoff up to and including the effective date of the sale. After the effective date of the sale, the purchaser becomes responsible for providing notice of any plant closing or mass layoff. The law considers any employee of the seller, other than a part-time employee, as of the effective date of the sale an employee of the purchaser immediately after the effective date of the sale. 29 U.S.C. § 2101(b)(1). Accordingly, “employees who find

themselves transferred from one company to another because of a sale simply are not to be held by any court to have suffered a remediable ‘employment loss.’” *Headrick v. Rockwell Intern. Corp.*, 24 F.3d 1272, 1280 (10th Cir. 1994). Under 29 U.S.C. § 2101(b)(1), “the obligation to warn employees in the event of a closure or mass layoff skips from seller to buyer, never triggered by the sale.” *Id.* This provision was added to the WARN Act after certain members of Congress expressed the concern that in the absence of some exclusion for the sale of a business, enterprising plaintiffs would attempt to argue that an employment loss occurred when they shifted from one employer to another as a result of a sale. *Id.* at 1280-81.

b. Relocation or Consolidation of the Business

The second exclusion from the definition of an “employment loss” relates to the transfer of employees as the result of a relocation or consolidation of all or part of the employer’s business. An employee will not experience an employment loss in this situation if, prior to the plant closing or mass layoff, “the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment” or “the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment,” provided that the employee accepts the offer within 30 days of the offer or the plant closing or mass layoff, whichever is later. 29 U.S.C. § 2101(b)(2).

D. Retention of Downsized Workers to Complete “Special Projects”

It is not uncommon for employers which have eliminated a position in a downsizing to request that an employee whose position was eliminated remain on for a limited retention period in order to complete a project or assist with the transition of work. Whether a release obtained from the employee at the time of the restructuring will protect the employer from claims allegedly arising during the individual’s extended period of employment will turn on the facts of the particular case.

In *Kellogg Co. v. Sabhlok*, 471 F.3d 629 (6th Cir. 2006), Kellogg eliminated Sabhlok’s job in a corporate restructuring. In exchange for enhanced severance benefits, Sabhlok signed a release of claims. Thereafter, at Kellogg’s request, Sabhlok continued to

work on various special projects for the company for a one-year retention period. According to Sabhlok, during that one-year period, Kellogg officials allegedly gave him repeated assurances that they would find him a permanent position, but no jobs were found. At the conclusion of the one-year retention period, Kellogg and Sabhlok signed an amendment to the severance agreement which gave Sabhlok six additional weeks of severance and a bonus in exchange for a broad non-compete clause, but kept all other terms of the original severance agreement in full force and effect. Several months later, when Sabhlok threatened to sue Kellogg in connection with Kellogg's failure to rehire him, Kellogg asked a court to enforce the terms of the release.

While Sabhlok conceded that the original release barred any breach of contract and age discrimination claims that arose up to the time that he signed the original and amended releases, he argued that he should be able to sue for failure to *rehire* based on alleged age discrimination, a claim which he argued was not covered by the original release, or by the amendment to the release, because the failure to rehire occurred after the effective dates of the releases. Noting that there is no broad rule as to whether a general release of claims will or will not bar a subsequent failure to rehire claim, the court stated that each case must be decided on its own facts. According to the court, “[u]nder some facts a general release will bar a subsequent failure to rehire and under other facts it will not. It depends on how closely related the rehire is to the original termination in terms of time and subject matter.” In Sabhlok's case, the court determined that “the issue turns on whether the failure to rehire during the retention period provided him with a new and discrete claim of discrimination or was merely an attempt to resurrect the age discrimination claim that was barred by his release of claims.” In holding that Sabhlok could not proceed with his failure to rehire claim, the court noted that Kellogg would not have offered Sabhlok additional benefits at the conclusion of the one-year retention period if Sabhlok was not waiving his right to sue for claims arising out of the retention period.