

Layoffs, the WARN Act, and the Post-RIF Workplace

Presented by
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THINGS TO THINK ABOUT REGARDING RIFs

Alternatives to Layoffs

Layoff Checklist

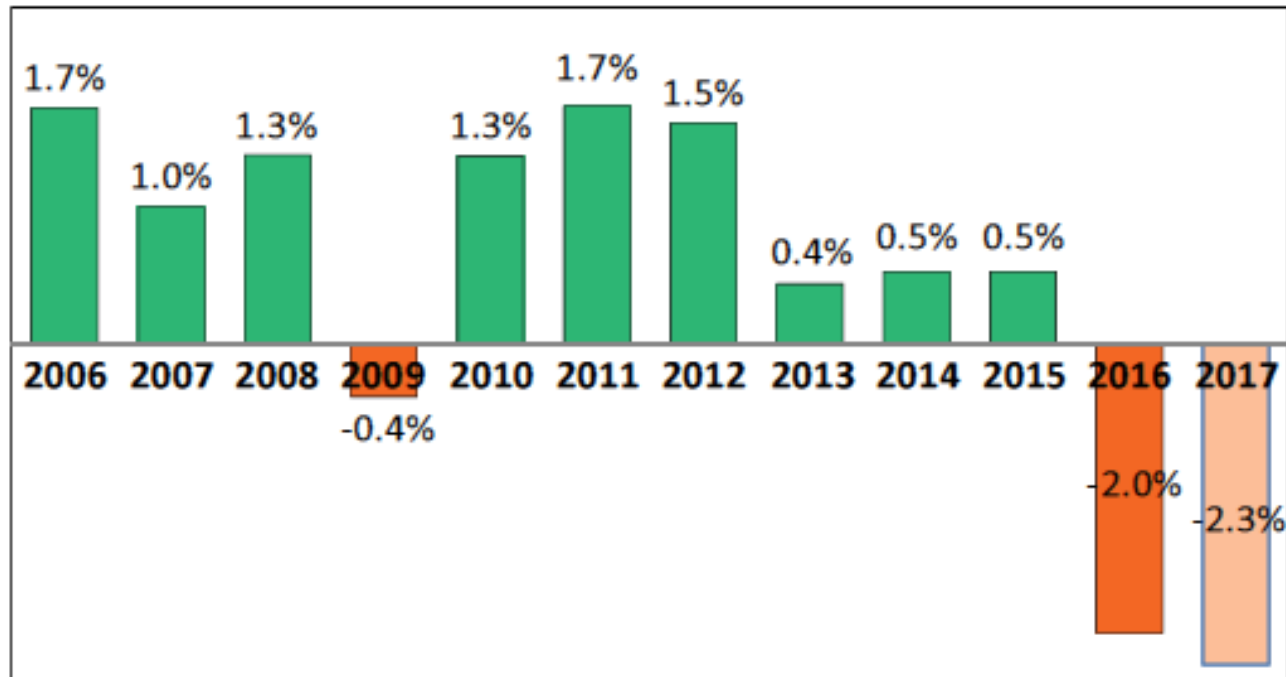
WARN Act

Older Workers Benefit Protection Act

Post-RIF Workplace

Questions

ALASKA FACES JOB LOSSES



Note: 2016 is preliminary and 2017 is forecasted.

Source: Alaska Department of Labor and Workforce Development, Research and Analysis Section

ALTERNATIVES TO LAYOFFS—GOALS

- Goals
 - Retain workforce
 - Cut costs
 - Flexibility to move workers back to full time and full production
- Most slides assume nonunion workforce; most of these issues require CBA review and discussions with union

ALTERNATIVES TO LAYOFFS?

- Hiring, pay freeze
- Reduce hours, benefits
- Expense controls
- Forced vacation (?)
- Temporary shutdowns or layoffs (furloughs)
- Increase employee share of premiums
- Terminating recent hires still in introductory periods
- Terminating underperformers
- Attrition, through terminations, resignations or transfers

WAGE CONSIDERATIONS WHERE ALTERNATIVES ARE USED

- Consider exemptions, contracts and policies when making pay or hour changes
- Furloughs, reductions in hours, forced use of paid leave, pay cuts all should be viewed through a wage/hour lens
 - A concern is salary basis of employment

ACROSS-THE-BOARD PAY CUTS

- Pay cuts:
 - Must be communicated in advance
 - In writing and sign off best practice
 - Length of time?
 - Bonus for performance in the amount of the cut?
- Exempt vs. nonexempt employees
 - Clear communication about hours to all
- Risk of disincented workforce

HIRING AND PAY FREEZES

- Concerns:
 - Staying competitive/attracting/retaining talent
 - Burnout
 - Hiring during a hiring freeze—equity
 - Succession planning
- Communication is key

DEMOTIONS AND ADDED WORK ISSUES

- Demotion concerns:
 - Selection
 - “Adverse employment action”
 - Exemption issues
- Added work concerns:
 - Burnout
 - Overtime
 - Exemption issues

HIGH-LEVEL LAYOFF CHECKLIST

- ✓ Alternatives to layoffs?
- ✓ Document business need, goals
 - Including steps taken to avoid RIF
- ✓ Establish objective, consistently applied selection criteria
- ✓ Where subjective criteria are used, apply objective evaluation guidelines; document legitimate, non-discriminatory reasons
- ✓ Legal requirements?
 - CBA, WARN Act, COBRA, OWBPA waivers, wage laws, NOTE: special rules for public works in AK

LAYOFF CHECKLIST (CONT.)

- ✓ Have supervisors evaluate employees using criteria
 - Train evaluators on selection criteria
 - Business need, not protected class

- ✓ Create layoff selection committee
 - Protected classes represented
 - Include HR, officers
 - No one included in the RIF
 - Evaluators submit recommendations
 - Makes final decisions, not supervisors

LAYOFF CHECKLIST (CONT.)

- ✓ Analyze impact of proposed RIF
 - Compare: current and post-RIF statistics
 - Compare: selected employees with non-selected
 - Any protected class prominent?
 - Review documentation for justification for risky individual layoffs

- ✓ Document, document, document

EEO REVIEW

- Conduct a disparate impact analysis of those selected to ensure no protected class is disproportionately affected
 - See 29 CFR Section 1607.4(D) for EEOC's guidance regarding conducting this analysis
- Where disparate impact identified, make legitimate non-discriminatory adjustments
- Review for selectees on protective leave, returning from protective leave

WARN ACT

- Worker Adjustment and Retraining Notification (WARN) Act
- Enacted 1988, response to crisis after “Black Monday”
- Purpose:
 - allow workers to plan
 - transition to new work



Dow on Oct. 19, 1987

WARN ACT

- WARN Act in 20 words or less (OK, 21):

Employers must provide 60 days' advanced notice of a "mass layoff" or "plant closing" where "affected employees" experience an "employment loss."

- If only that were all...WARN is very complex

WHAT MAKES WARN SO TRICKY?

- Which employers are covered?
- Whom do employers provide notice to?
- Where do things happen that require notice?
- What must notice contain?
- How must notice be given?
- When do employers need to give notice?

Is X COMPANY COVERED BY WARN?

Employers covered by WARN:

100+ employees

Excluding less than 6 months

Excl. part time (20 hrs/wk)

Covered = for-profit corporations,
nonprofits, public and quasi-public
entities

Not covered = government agencies

X, Inc:

120 employees

15 of them work part time

4 were hired last 6 months



WHAT EVENTS TRIGGER WARN REQUIREMENTS?

- “Plant closing”
 - 50+ employees within 30 days (90 days aggregated)
- “Mass layoff”
 - 500 employees in 30/90-day period, or
 - 50 to 499 employees if 33% of workforce
- Sale of business causing employment loss
- Exception – temporary facility or project

WHAT IS AN “EMPLOYMENT LOSS”?

“Employment loss” includes

- Involuntary termination
 - Not for cause, early retirement
- Layoff longer than 6 months, or
- Loss of 50% of hours in each month over 6 months
- Does not include part time workers, new workers hired within 6 months
- Exception: employee who refuses reassignment within “reasonable commuting distance” does not experience employment loss

X PLANS LAYOFF—IS WARN IMPLICATED?

First round: (March 10, 2017)

40 full time – permanent termination

5 full time – layoff for 5 months

6 full time – permanent termination
(but these were only hired
5 months ago)



Second round: (April 24, 45 days later)

5 full time – reduce hours 40 to 20 hrs/wk

5 full time – layoff for 8 months, until end of 2009



X CLOSES PLANT—Is WARN IMPLICATED?

Shutdown at “X-1” Fab

40 full time employees

8 part time

3 new hires (hired 2 months ago)

1 of full time employees is offered
reassignment to X-2 Fab

Is this a “plant closing”?



X-1



X-2

To Whom Must X Provide WARN Notice?

- Union representative
 - or -
- “Affected employees”
 - Who “reasonably may expect employment loss”
 - Yes, this time part-time workers are included!
- Local government
 - State dislocated worker unit
 - Alaska = TAA & Rapid Response Program Coordinator
 - Department of Labor and Workforce Development
 - Chief elected official where site is located

CONTENT OF VALID NOTICE

- Content depends on who is receiving notice (union rep, employee, or local government)
- Must be in writing!
- Invalid notice
 - verbal
 - form insert into paycheck
 - blanket, unspecific notice
- DOL has sample forms



WHEN MUST X PROVIDE NOTICE?

- Written notice 60 days before employment loss
- Exceptions
 - unforeseeable business circumstances
 - faltering company
 - natural disaster
- Notice still required as soon as “practicable”
- What about when you don’t know who will be laid off 60 days ahead of time???

REMEDIES AND PENALTIES

- 60 days' backpay
 - Can be reduced by:
 - Wages and benefits in lieu of notice
 - Additional payments not obligated by law
- \$500 civil penalty per day
(local government notification)
- Civil suit, attorney fees



X NEEDS TO LAY OFF WORKERS OVER 40

- Older Worker Benefit Protection Act (OWBPA) implicated with any employee over 40
- Early retirement plans are permitted, if voluntary
- Severance Agreements including release of claims for workers 40+ have additional requirements
- Consider whether you have an ERISA severance plan

WHAT MUST OVER-40 SEVERANCE INCLUDE?

- Clear, plain language
- Express reference to ADEA rights waived
- Expressly limited to past claims only
- Additional consideration *for waiver*
- Advise in writing to consult an attorney
- 21 days to consider offer (if one employee)
(45 if group termination program)
- 7-day revocation period

OWBPA AND GROUP TERMINATIONS

- 45-day consideration period
- Decisional Unit determination is key
- Disclosure of those selected and not selected for inclusion in layoff

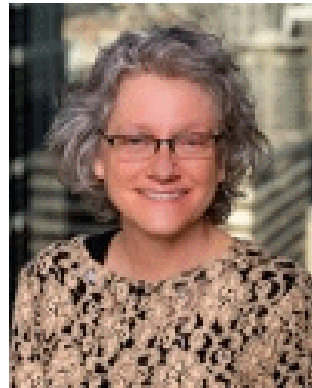
COBRA

- Consolidated Omnibus Budget Reconciliation Act (COBRA)
 - Adopted in 1986
 - Provides right to choose to continue group health benefits provided by a group health plan for limited periods of time under certain circumstances
 - <http://www.dol.gov/dol/topic/health-plans/cobra.htm>

POST-RIF WORKPLACE

- Most of the same considerations that apply in the Alternatives to RIF section apply here as well. In addition, consider:
- Retention challenges
- Maintaining a healthy workplace
- Risk avoidance:
 - Respond to demand letters and EEOC charges promptly

QUESTIONS?



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