

# A lawyer's perspective on planning a reduction in force

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## Introduction

Any assessment of the consequences of “job loss” must include an understanding of the legal context in which it occurs. This article provides a broad overview of that context relative to some key legal considerations in a reduction in force (RIF). In light of these key considerations, I then describe a practical approach to planning a RIF from a lawyer's perspective.

Greatly complicating the lawyer's approach to RIF planning is the “lottery” mentality in contemporary culture, whereby individuals who sue their former employer believe that a certain jackpot awaits them. In addition, many people seem unwilling to accept personal responsibility for their own unsuccessful job performance that leads to job loss. Even for employees who perform their jobs well, too many seem unwilling to accept the notion that in this economic system even good or excellent performers lose their jobs without a law necessarily being violated in the process.

The judicial system is not engaged in an academic endeavor to weigh and test theories in order to discover ultimate truths. Lawyers, judges, and juries have very limited time, money, and information to make important judgments that are often based on testimony from individuals with faded memories about past events.

A jury must then decide whether it is more probable than not (at least 51 percent certain) that the former employee's termination violated a law.

Few life events are more devastating, emotionally and financially, than losing a job. This fact necessarily colors a lawyer's perspective on assessing potential liabilities associated with job loss. If a lawsuit proceeds to trial, jurors may have jobs, may have lost jobs, or may have family and friends who have lost jobs or may lose their jobs. Most people can at least conceive of facing a potential job loss and can imagine themselves in a situation similar to the plaintiff who lost a job. Therefore, an employer forced to defend a claim

that a termination decision was unlawful must consider the emotions and perspectives of a potential jury that might judge the claim and award monetary damages if it concludes a law was violated.

Some surveys of potential jurors have indicated that an employer forced to defend a discrimination claim is at a disadvantage before ever entering the courtroom. One survey conducted by the Minority Corporate Counsel Association and DecisionQuest<sup>1</sup> revealed that more than 75 percent of white males, who are usually regarded as most supportive of corporations, report distrusting corporations due to events such as the Enron scandal. Further, 85 percent of the survey respondents indicated a belief that large corporations hide information about their products until they are caught by the government or in a lawsuit, and 75 percent of respondents indicated a belief that managers and senior executives are more likely to perjure themselves than lower-level employees.

Another DecisionQuest survey in conjunction with the *National Law Journal*<sup>2</sup> indicated that close to half of the survey respondents disagreed with the statement that most big companies treat all employees fairly and only 29.8 percent of agreed with the statement. Overall, 42.3 percent of respondents agreed that older workers and minorities are the first to lose their jobs in a layoff, although only 18 percent of the white respondents agreed with the statement. More than two-thirds (67.4 percent) of the respondents felt that race discrimination and gender discrimination are still present at many companies.

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How do employers respond to a system of complex employment laws that are applied in a costly and challenging judicial context? They try to plan in advance so that they have the best possible chance to stay out of court or to win the hearts and minds of a judge and jury if necessary. To understand how this goal can be accomplished, one must first have a fundamental framework of some of the legal claims employers can face, and the following two sections address some key legal issues in that framework. The fourth section then provides an overview of an approach to planning for and conducting a RIF.

### **Selected non-discrimination issues when confronting layoffs**

#### ***General overview***

Anti-discrimination laws now span a myriad of protected classes under federal, state, and local laws. Title VII of the Civil Rights Act of 1964<sup>3</sup> (Title VII) prohibits discrimination on the basis of race, color, religion, sex, and national origin. The Age Discrimination in Employment Act of 1967<sup>4</sup> (ADEA) prohibits discrimination against employees age 40 or older. The Americans with Disabilities Act of 1990<sup>5</sup> (ADA) and the Rehabilitation Act of 1973<sup>6</sup> (which covers federal contractors) prohibit disability discrimination. The Equal Pay Act<sup>7</sup> prohibits gender-based wage discrimination, and the Pregnancy Discrimination Act<sup>8</sup> prohibits pregnancy-based discrimination. These federal laws also prohibit retaliation against individuals who oppose unlawful conduct or who engage in other “protected” activities, such as filing an administrative charge of discrimination or participating in a government investigation. Numerous state and local laws mirror these federal prohibitions and also prohibit other types of discrimination, such as discrimination on the basis of sexual orientation, marital status, source of income, arrest records, and others.<sup>9</sup>

A number of strategies exist to avoid lawsuits or to place the employer in the best possible position to defend against a lawsuit. The legal framework in which a lawyer approaches employment decisions during a RIF guides these strategies. Generally, a plaintiff can prove that her employment was terminated due to unlawful discrimination via three types of claims: disparate treatment, disparate impact, and pattern-and-practice claims, each of which is described in the following sections.

#### ***Disparate treatment***

A disparate treatment claim at first blush seems simple. It is a claim that an employee within a protected class was treated differently than an employee not in the protected class, and the reason for the different

treatment is alleged to be intentional discrimination based on the employee’s protected class. The methods of proving disparate treatment, however, are not always so straightforward.

Direct evidence may be the easiest way to prove discrimination (or at least the easiest way to obtain a jury trial). Direct evidence includes facts that prove discriminatory animus toward the plaintiff without resorting to inferences or presumptions.<sup>10</sup> Some courts also regard direct evidence as including circumstantial evidence, so long as the additional requirement is met that the evidence reflect directly on animus and the employment decision being challenged.<sup>11</sup> Derogatory comments that reflect bias are the most common type of direct evidence, such as a supervisor referring to an older employee as “no spring chicken” and stating that he would not advance in the company because of his age,<sup>12</sup> or a supervisor stating that the employee (later plaintiff) is “getting close to retirement” and thus the supervisor did not “want to spend time or energy on her.”<sup>13</sup>

Not all derogatory comments, however, support discrimination claims. Ambiguous statements that are susceptible to a non-discriminatory interpretation might not support a claim. Other statements, even if not ambiguous, might not be connected directly to the plaintiff if the statement was not made in connection with the termination decision or was too remote in time or context relative to the plaintiff. Examples of such statements include generally referring to older workers as “old timer dinosaurs” but not referencing the plaintiff specifically,<sup>14</sup> or referring to an employee as “burned out” and not able to change “old ways” in the face of new management’s change directives.<sup>15</sup> Likewise, comments by co-workers or managers not involved in the decision affecting the plaintiff are not relevant, unless the individuals had some influence on the decision.<sup>16</sup>

Direct evidence cases usually get the headlines, because a surreptitious tape recording or an electronic mail message tends to provide greater shock value for the press. In the overwhelming majority of cases, however, no direct evidence exists. Without direct evidence, a plaintiff must resort to an “indirect method” of proving intentional discrimination. This method was endorsed by the Supreme Court in *McDonnell Douglas Corp. v. Green*.<sup>17</sup>

The first step in the *McDonnell Douglas* indirect method of proof is for the plaintiff to establish a *prima facie* case of discrimination. The *prima facie* case consists of proving that 1) the plaintiff is a member of a protected class, 2) he suffered an adverse employment action, 3) he was at least minimally qualified to perform the

job in question, and 4) a less qualified person not in the protected class received the job.<sup>18</sup> To be “similarly situated” for purposes of comparison in proving a discrimination claim, the comparators (that is, the employees against whom the plaintiff is comparing his own situation) must be substantially identical to the plaintiff in all relevant respects within the context of the employment decision at issue.<sup>19</sup> Importantly, in the age discrimination context, the plaintiff can compare herself to an individual who is within the protected class of age 40 or older, so long as the comparator is “substantially younger” than the plaintiff. At least one federal court of appeals has adopted what appears to be a bright-line rule that an age difference of six years or less fails to establish a *prima facie* case.<sup>20</sup>

If a *prima facie* case is established, the second *McDonnell Douglas* step is for the employer to articulate a legitimate, non-discriminatory reason for its decision.<sup>21</sup> In a RIF context, legitimate non-discriminatory reasons for an individual’s layoff may include cost-cutting considerations, performance, or the necessity for particular skills and abilities, among other reasons. It is important to note that courts usually will not second-guess an employer’s decision about when it needs, or does not need, to conduct a RIF for economic reasons unless other evidence of discrimination exists.<sup>22</sup>

After the employer articulates its reasons for the RIF and termination decision, the third step of the *McDonnell Douglas* indirect method of proof is for the plaintiff to prove that the employer’s articulated reason for the layoff decision is a pretext for discrimination, that is, the reason is phony and the real reason is unlawful discrimination.<sup>23</sup> Plaintiffs bear a heavy burden of proof in an economically motivated RIF, because courts tend to recognize that such RIFs often result in qualified employees losing their jobs even in the absence of discrimination.<sup>24</sup> Selecting employees for layoff based on performance or skill and ability has been sustained if the rating system used to make the layoff decision is job-related and the selection criteria are applied consistently.<sup>25</sup> Quantitative measures such as sales results or productivity have also been upheld as nondiscriminatory reasons for layoff.<sup>26</sup> Furthermore, when an entire job position or function is eliminated so that no comparison to other similarly situated individuals can be made, a discrimination claim may fail.<sup>27</sup> An employer is under no obligation to transfer employees whose job positions have been eliminated, but if it does so, the transfer decisions must be based on non-discriminatory criteria.<sup>28</sup>

When an employer lays off a protected class member based on a reasonable belief that the individual is

less qualified than the person retained, courts are generally not willing to recognize a discrimination claim. A plaintiff cannot rely on her own subjective belief that she is better qualified than individuals retained in the RIF. Courts generally refrain from substituting their own judgment for the employer’s judgment in reviewing layoff decisions in a RIF.<sup>29</sup>

A plaintiff faces a particularly significant obstacle in establishing pretext when the decision-maker and the plaintiff are members of the same protected class, such as when both are black, both are women, or both are approximately the same age.<sup>30</sup> Such a defense, however, is not airtight, and many courts recognize that a “same group” inference does not, standing alone, foreclose a plaintiff’s claim.<sup>31</sup> Another significant obstacle to the plaintiff’s claim is the situation where the decision-maker both hired *and* fired the plaintiff within a relatively short period (from six months to two years). In these circumstances, courts are generally not willing to infer discrimination, and the plaintiff’s claim may never reach a jury.<sup>32</sup>

Courts have generally held that an employee’s high cost due to salary and benefits can be a reasonable factor other than age on which to base a layoff decision in a reduction of force. Thus, replacing workers with less costly employees should not violate the ADEA if the result is the layoff of older workers. These courts have determined that seniority and wage rates are analytically distinct from age, although this subject remains controversial and may implicate a disparate impact discrimination claim.<sup>33</sup>

### **Disparate impact claims**

Discrimination can be established without direct or indirect circumstantial evidence of discriminatory motive via the “disparate impact” theory of liability. The “disparate impact” theory of liability involves a claim that an otherwise neutral policy, practice, or selection criterion adversely affects a protected class of individuals. Taking into account the possibility of a disparate impact claim is a mandatory consideration for any employer engaged in a RIF.

The disparate impact theory of liability in the employment context was first recognized by the Supreme Court in *Griggs v. Duke Power Co.*<sup>34</sup> The Supreme Court held that Duke Power could be held liable under Title VII for race discrimination based solely on statistical evidence. Duke Power required that entry-level job applicants have a high school diploma and achieve a satisfactory test score on an exam administered during the application process, but these requirements resulted in a statistically significant screening-out of black applicants. Furthermore, Duke

Power was unable to show that the high school diploma and test score were job related and necessary for the business. As a result, the court held that the statistical evidence supported Title VII liability even without direct or indirect evidence of racial animus.

It is essential that employers assess whether or not a RIF will have a statistically significant disparate impact on a protected class before finalizing layoff decisions. If a disparate impact is identified, steps might be taken to eliminate the statistical disparity or to validate the RIF selection criteria as being job-related, consistent with business necessity, and applied consistently. A disparate impact analysis involves a statistical comparison of a relevant work force population against an appropriate, comparable group. A generally accepted legal principle is that a statistical analysis showing a difference of more than plus or minus two or three standard deviations indicates that a disparate impact likely is not by chance and might be motivated by unlawful discrimination.<sup>35</sup> Where standard deviations are in the range of one to three, courts have been more skeptical of reaching a conclusion that the statistics, standing alone, support a claim of unlawful discrimination.<sup>36</sup> Furthermore, courts recognize that probative statistics normally can be generated only if the numbers involved are sufficiently large to be susceptible to a proper statistical analysis.<sup>37</sup> On the other hand, courts have recognized the “inexorable zero,” in which a small sample size will not inhibit a finding of discrimination when faced with a zero or near-zero selection rate of individuals in the protected group.<sup>38</sup>

Using statistics as evidence in lawsuits involves a battle of the experts, with lawyers trying to “spin” their own experts’ analyses to convince a judge or jury that discrimination likely did or did not occur. Judge Posner, of the Seventh Circuit Court of Appeals, described at least one court’s view of standard deviation analysis as court evidence as follows:

The 5 percent [significance] test is arbitrary; it is influenced by the fact that scholarly publishers have limited space and don’t want to clog up their journals and books with statistical findings that have a substantial probability of being a product of chance rather than of some interesting underlying relation between the variables of concern. Litigation generally is not fussy about evidence; much eyewitness and other nonquantitative evidence is subject to significant possibility of error, yet no effort is made to exclude it if it doesn’t satisfy some counterpart to the 5 percent significance test. A lower significance level may show that the correlation is spurious, but may also be a

result of “noise” in the data or colinearity (correlation between independent variables, such as sex and weight); and such evidence, when corroborated by other evidence, need not be deemed worthless. Conversely, a high significance level may be a misleading artifact of the study’s design; and there is always the risk that the party’s statistical witness ran 20 regressions, one and only one of which supported the party’s position and that was the only one presented, though, in the circumstances, it was a chance result with no actual evidentiary significance. ... It is for the judge to say, on the basis of the evidence of a trained statistician, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury.<sup>39</sup>

A critical aspect that must be considered to establish the validity (and persuasiveness) of a disparate impact analysis is the use of proper comparative groups. It may be appropriate to review pre- and post-RIF work force statistics on a company-wide basis, location basis, departmental basis, or decision-maker basis. Relevant work force comparisons might also consist of all similarly situated employees whose retention or layoff is governed by the same decision-maker(s). Often, several relevant work force possibilities exist for analysis, and an employer planning a RIF would be wise to assess a potential disparate impact in all groupings that might reasonably be subject to challenge.

In addition, timing may be a factor to consider. Ongoing layoffs over a period of months may result in a cumulative disparate impact that may not be revealed in a simple before-and-after snapshot analysis of a particular layoff.<sup>40</sup> On the other hand, a longer time frame might also work to an employer’s advantage if the average age of the work force has stayed the same or increased, for example.

A further complicating factor is that the Supreme Court recognized in *Watson v. Fort Worth Bank and Trust*<sup>41</sup> that the disparate impact theory of liability encompasses both subjective and objective decision-making. And, a statistical analysis of a neutral policy should not be assessed at the “bottom line.” Instead, a plaintiff must identify the specific aspect of the decision-making process that can be properly separated for statistical analysis and that has a disparate impact on the protected group.<sup>42</sup> For example, if layoffs are based on a combination of factors, such as attendance and performance, each weighted equally, members of a protected group may allege a disparate impact with respect to either criterion.

The existence of a statistically significant disparate impact on a protected class does not mandate a finding of unlawful discrimination, however. An employer can still defend its actions by proving that the challenged policy or criterion “is job-related for the position in question and consistent with business necessity.”<sup>43</sup> After an employer meets its burden of production and articulates a legitimate nondiscriminatory reason for the layoff, the plaintiff must respond to the specific reasons given by the employer for the layoff decision.<sup>44</sup>

In the disparate impact context, where employee performance is assessed based on subjective standards (such as judgments about “teamwork” or “positive attitude”), courts also tend to evaluate the checks instituted by an employer on managers’ discretion. These checks should be built into the selection process and should include training. Another check is whether or not decision-makers are diverse in terms of their demographic make-up, whether they rely on evaluations that are validated, and the extent to which initial decisions are reviewed by established committees or higher levels within the organization.<sup>45</sup> If these checks do not exist, a court may be less willing to accept the employer’s business justification defense for its selection criteria that caused a disparate impact and instead allow a jury to decide whether the defense should be accepted.

Clearly, a generic “cookie-cutter” approach to a statistical analysis of a RIF is dangerous. An employer must be cognizant that the potential for insignificant statistical results could be significant if the data are combined in a different manner. Further complicating a disparate impact analysis is that all employees are rarely equal in terms of the likelihood they could be selected for layoff. In almost every RIF, some employees might be considered indispensable, which then calls into question whether they should be included in any comparative statistical analysis. The challenge, therefore, is to conduct a statistical analysis at an organizational level that is legally relevant, which is usually the level where the decisions are actually made so that comparable employees can be identified and compared.

The availability of the disparate impact theory of liability in age discrimination cases is very important to consider in the RIF context. On March 30, 2005, the United States Supreme Court issued its decision in *Smith v. City of Jackson*<sup>46</sup> and held that ADEA plaintiffs can assert disparate impact age discrimination claims. Until this decision, many courts had determined that disparate impact claims were not available under the ADEA. The *Smith* case is extremely important in the RIF context, because ADEA claims tend to predominate in RIFs. However, while opening the door for

potentially more and broader ADEA claims, the court simultaneously established hurdles that do not necessarily exist for plaintiffs in Title VII disparate impact claims. The court made it clear that disparate impact claims under Title VII and the ADEA are different in key respects.

First, the *Smith* court held that ADEA disparate impact claims are more narrow than Title VII disparate impact claims, because an ADEA plaintiff must identify a *specific* test, requirement, or practice that causes a disparate impact. A generalized policy or practice will not suffice. At issue in *Smith* was a city’s decision to raise starting salaries by a set amount of money, which in turn increased older and more senior employees’ pay by the same amount of money. However, the percentage increase was less for older (more senior) employees as an overall percentage of their pay. The U.S. Supreme Court characterized this pay raise as a generalized policy that was not sufficiently specific to support an ADEA disparate impact claim. After *Smith*, there is sure to be substantial litigation over whether a test, requirement, or practice is sufficiently “specific” as a matter of law.

Second, the *Smith* Court determined that the city’s reasons for instituting the pay raise in the manner that it chose were reasonable. Unlike Title VII, the ADEA specifically allows employers to take actions based on “reasonable factors other than age.”<sup>47</sup> The court determined that the city’s method of raising starting salaries and the resulting effect on other salaries was based on a reasonable plan. Furthermore, the court made it clear that an ADEA plaintiff has the burden to *disprove* the reasonableness of the factors that the employer used to make employment decisions (whereas this burden is not on a plaintiff in a Title VII disparate impact claim). In light of courts’ usual deference to employers’ business judgments, this proof hurdle may be particularly challenging for most ADEA plaintiffs to overcome. The *Smith* case, therefore, also highlights the importance for employers to plan their RIFs in advance in order to adequately evaluate and document the reasonableness of the business judgments being used for initiating the RIF and for making employment selections.

This much is clear about the potential for a disparate impact claim: A potential plaintiff might literally troll through the employer’s work force looking for some combination of data that can produce a statistically significant result. Moreover, even if a disparate impact claim under the ADEA is not viable as a matter of law, statistical disparities may still be acceptable evidence in a disparate treatment case. Thus, any comprehensive assessment of the adverse effects of RIF selections can generate a large array of statistical

results, likely even statistically significant results, and a dizzying array of potential employment decisions to check, recheck, and validate.

### ***Pattern and practice claims***

When allegations of disparate treatment relate to an entire class of individuals, a plaintiff might claim that a pattern-and-practice of discrimination exists. In such a case, the plaintiff combines his own allegations of disparate treatment with allegations that show discrimination is a “standard operating procedure” for the employer. To support this claim, more than isolated instances of discrimination must be shown, although it is also not necessary to show discrimination against every class member. Gross statistical disparities might suffice to raise an inference of discrimination, but substantial anecdotal evidence of discriminatory acts must be produced to maintain a pattern-and-practice claim.<sup>48</sup>

### **Other legal considerations in a reduction in force**

#### ***Leaves of absence***

The Family and Medical Leave Act of 1993 (FMLA) requires employers to provide up to 12 weeks of unpaid leave during a 12-month period for employees to care for a newborn child, a newly adopted child, a spouse, child or parent with a serious health condition, or the employee’s own serious health condition.<sup>49</sup> Several states have even more stringent leave requirements.<sup>50</sup> The FMLA forbids discrimination against employees who have taken a family or medical leave or who are on such a leave.<sup>51</sup> Employees are entitled to return to their jobs at the end of their FMLA leaves, or they must be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.<sup>52</sup> However, nothing in the FMLA entitles an employee to “any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.”<sup>53</sup> This proviso should insulate employers from attack under the FMLA when terminating the employment of an employee on FMLA leave during a RIF, provided that the employer can support its contention that the employee would have been selected for layoff if he had been at work instead of on FMLA leave.<sup>54</sup>

#### ***The Americans with Disabilities Act***

The ADA prohibits discrimination against individuals because of their disabilities and requires an employer to reasonably accommodate an employee’s disability if the employee can perform the essential functions of his job with such an accommodation.<sup>55</sup> The ADA prohibits selecting an employee for layoff due to a desire to avoid making or continuing a reasonable

accommodation. In fact, the reasonable accommodation obligation under the ADA contemplates job restructuring, including modified work schedules and other special arrangements that would allow the employee to perform his job.<sup>56</sup> Therefore, in the midst of a RIF, an employer may be required to engage in an interactive process with a disabled employee to determine whether he can continue to perform his job, a new job, or a new combination of job duties. Furthermore, if an immediate or very near-term contribution is critical to the company’s operations, an employee’s leave of absence that might have been reasonable before the RIF might not be reasonable after implementation of the RIF.<sup>57</sup> However, it is still critical to engage the employee in an interactive process to determine the continued leave restrictions; and sometimes in the midst of the hectic pace of RIF planning, an employer may neglect to do so.

#### ***WARN Act***

In any significant job loss action instituted by an employer, one eye should always be focused on The Worker Adjustment and Retraining Notification Act (WARN).<sup>58</sup> WARN requires that covered employers provide to unions, non-union affected employees, and certain government officials 60-days written notice before a covered “mass layoff” or “plant closing.” A mass layoff or plant closing occurs when a sufficient number of employees suffer an “employment loss” over a relevant period (either 30- or 90-day rolling periods).

An employment loss is an involuntary termination (other than for cause), a layoff of more than six months, or a reduction in work hours of more than 50 percent during each month of any six-month period.<sup>59</sup> A plant closing occurs when there is a permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, with 50 or more employees suffering an employment loss during a 30-day period. A mass layoff occurs when, during a 30-day period, at least 50 employees suffer an employment loss and the number of affected employees also constitutes at least 33 percent of a single site’s employees. If 500 or more employees are affected over a 30-day period, a mass layoff occurs regardless of whether the 33 percent threshold is met.<sup>60</sup>

However, significant employment losses often do not occur in discreet 30-day time frames. Thus, under WARN, employment losses for two or more groups of employees at a single site of employment may be aggregated over a 90-day period to establish a plant closing or mass layoff if, and only if, each group, standing alone, would be insufficient by itself

to constitute a plant closing or mass layoff and only if the layoffs are part of the same actions and causes (and are not an attempt by the employer to evade the requirements of WARN).<sup>61</sup>

From these statutory rules for aggregating employment losses, clearly one of the practical challenges of complying with WARN is the ability of an employer to anticipate the timing and number of employment losses without inadvertently, or unavoidably, triggering WARN's notice requirements. Finance and operations executives might not take into account WARN's requirements in their planning processes, especially if they are unaware of the potential to aggregate job losses over a long period. The financial effect of inadvertently triggering WARN can be significant (a successful plaintiff can obtain up to 60 days of lost pay and benefits and attorney's fees).<sup>62</sup>

Some narrow exceptions or exemptions from notice are allowed under WARN. For example, an employment loss does not occur when the closing or layoff is the result of a relocation or consolidation of part or all of an employer's business and, prior to the closing or layoff: 1) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a six-month break in employment; or 2) the employer offers to transfer the employee to any other site of employment regardless of distances with no more than a six-month break in employment, but only if the employee accepts the transfer within 30 days of the offer or of the closing or layoff, whichever is later.<sup>63</sup> The uncertainties in this exception include defining a "reasonable commuting" distance, which may vary depending on location conditions and customs. Also, because of the time in which an employee has to accept a transfer outside of a reasonable commuting distance, a prudent employer might give the individual a WARN notice just in case it has misjudged the reasonableness of commuting distances or is otherwise unsure about the employee's acceptance of the transfer offer.

WARN also contains limited exceptions for a "faltering company" and for "unforeseeable business circumstances."<sup>64</sup> Under these exceptions, the employer can provide less than 60 days notice, but must still provide as much notice as is practicable. The "faltering company" exception applies if, at the time notice would be required, the employer is actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone a shutdown; but, the employer must reasonably and in good faith believe that giving WARN notice would preclude the employer from obtaining the capital or business. The "unforeseeable business circumstances" exception also

allows less than 60 days notice where the WARN event is caused by circumstances that were not reasonably foreseeable to the employer.<sup>65</sup> The burden of proof, however, is on the employer to prove that the event causing the employment losses was truly unforeseeable to a reasonable employer in the same situation.

#### ***Waiver and release agreements***

A key strategy for any employer engaged in a RIF and desiring to avoid litigation necessarily includes providing severance pay to employees terminated in a RIF, in exchange for their signing an agreement not to sue the employer. In a RIF context, age discrimination claims predominate and pose the most potential for serious liability exposure for employers. Therefore, it is important to understand the statutory requirements for obtaining a waiver of federal age discrimination claims.

The Older Workers Benefit Protection Act (OWBPA)<sup>66</sup> took effect on October 16, 1990, as an amendment to the ADEA. OWBPA provides that an individual may not waive her rights under the ADEA unless the waiver is "knowing and voluntary." Under OWBPA, the waiver is knowing and voluntary if it meets the following conditions: 1) it is a written agreement that can be readily understood by the employee; 2) the waiver specifically refers to a waiver of rights arising under the ADEA; 3) the employee must receive consideration (value) in addition to what she is already entitled to; 4) the waiver is limited to rights or claims arising as of, or prior to, the effective date of the agreement; 5) the individual is advised in writing to consult with an attorney before signing the agreement; 6) the employee is provided at least 21 days to consider the agreement; and 7) after signing the agreement, the individual has at least seven days to revoke her signature (assent).<sup>67</sup>

If the waiver is offered in connection with an exit incentive or employment termination program offered to a group or class of employees (which usually includes a RIF), additional conditions must be met. Individuals must be given at least 45 days to consider the waiver agreement. The employer also must inform each individual in writing and in a manner that can be understood by the average person as to: 1) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and 2) 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 are not eligible or selected for the program.<sup>68</sup>

The information about groups, eligibility factors, job titles, and ages in the 45-day OWBPA waiver agreement

is calculated to allow an employee (and his lawyer) to determine whether he could have at least a colorable age discrimination claim, either disparate treatment or disparate impact.<sup>69</sup> If the information provided to the employee is incomplete or flawed, the waiver may not be valid. Of course, employers desire to avoid lawsuits and thus may try to construct the informational attachments to an OWBPA release so as to comply with the law while not serving as a ready guide for a plaintiff desiring to pursue litigation. Affected employees who sign releases and desire to have them invalidated may attack the substance or scope of the information provided in the release in order to have it voided. Relevant considerations include whether the employer used the titles and classifications before the layoffs; whether the titles and classifications were used in assessing or choosing workers for layoff; and whether the titles and classifications were meaningful to the average worker in his or her understanding of the workplace and layoff process.

Another difficult aspect of the attachments and information required for a 45-day OWBPA release is determining the appropriate group of affected employees to disclose in the attachment to the waiver agreement. Regulations require disclosure of the employees selected and not selected (and their ages) in the “decisional unit.”<sup>70</sup> However, the precise decisional grouping is often difficult to define when there are multiple layers of decision-making involved. An example of the potential difficulty posed by this regulation is *Griffin v. Kraft General Foods, Inc.*<sup>71</sup> In this case, Kraft decided to shut down a plant in Georgia and lay off all of the workers. Kraft, however, only disclosed the job titles and ages at the affected plant. A plant in another state was part of the “decisional unit” because both plants were reviewed, but the Georgia plant was selected. The court held that because “job classification” and “organizational unit” are not limited to a single plant, individuals in the same job classification or organizational unit may include employees at other plants in the same company.

### **Putting the law to work—A practitioner’s approach to planning a reduction in force**

In light of the legal principles discussed above, it is essential to involve a lawyer in the RIF-planning process from its inception. The lawyer can help analyze and develop the facts and tone of the entire RIF in a confidential, privileged context and with the goal of avoiding litigation. Even if litigation cannot be avoided, a knowledgeable and experienced lawyer should be able to identify potential litigation risks and to develop ways to reduce or eliminate the risks to the employer.

### ***Reasons for the RIF***

Foremost, the RIF must be a legitimate employment action in order to take advantage of favorable case law deferring to employer judgments and opinions. The employer must identify the reasons for the RIF and should document the validity of these reasons. This documentation may be used later in a governmental proceeding or in court to prove that the employer’s actions were justified and not discriminatory. Some of the more common reasons for a RIF include: reduction in production; exiting a product, service, or business; closure, consolidation, or relocation of operations; restructuring, combining, or realigning to streamline or eliminate departments, functions, jobs, or management layers; a general need for cost savings; and automation, technology change, and efficiency efforts.

The public relations of a RIF can be very important from a lawyer’s point of view (both external and internal communications). The official and unofficial communications about the RIF can be discovered in related litigation by plaintiffs. Plaintiffs may try to use these communications to attack the legitimacy of the employer’s actions if there is conflict between the substance of the communications and the reasons articulated during litigation for the RIF or position eliminations. A jury may eventually read the company’s communications about the RIF, and any statements that seem harsh or uncaring may be held against the employer by the jury when determining liability and damages. Further, sound employee relations demand a credible communication effort. Too often, employees sue their employers because they are surprised, confused, or hurt by a decision they do not understand. Therefore, an employer should anticipate the need for communication with employees at various stages of the RIF process and ensure accuracy of the communications.

### ***RIF guidelines***

Guidelines for the RIF are a crucial aspect of avoiding and defending against litigation. RIFs are usually not common occurrences in most companies. Therefore, existing policy manuals and handbooks may contain outdated guidelines for a RIF that need updating. These documents also may provide information about employee expectations that should be factored into the RIF plans. Where guidelines do not exist, are not in effect, or need to be changed, the employer should establish separate written guidelines to govern the RIF process. The guidelines are vital to explaining and justifying each termination or other employment decision.

The guidelines should list the criteria for employment decisions, and these criteria should be prioritized (either by corporate mandate or by each decision-maker)

and documented. The prioritized criteria should reflect the performance, skills, and abilities desired for the restructured organization and for any newly created or consolidated job positions. Then, the employer should determine which employees' performance, skills, and abilities will or will not be needed and document the reasons why. In some cases, indispensable skills and abilities may trump performance rankings. When this occurs, it will be important to communicate to employees the criteria used for making decisions; otherwise, employees may resent the decision, consider it to be unfair, and resort to legal actions against the company.

Past performance evaluations should always be reviewed when making the RIF selections. Any validity issues with the evaluations—such as supervisor bias, lack of explanations for ratings, or all employees being ranked exactly the same—should be noted. Where evaluations do not exist or have validity problems, other documents on which performance can be assessed should be identified relative to the RIF selection criteria.

In analyzing past performance reviews and performance rankings during a RIF, the most common management mistake is characterizing performance in a conclusory fashion (for example, “satisfactory” or “succeeds”). Instead, managers must document, describe, or explain the facts supporting their conclusions. When the conclusions are based on subjective judgments, objective facts supporting the judgments should be documented and described as much as possible. Judges and juries are often very skeptical of subjective judgments, and when no or conflicting supporting information is provided an employer has a greater liability risk.

Because RIFs often negatively affect employees whose performance is otherwise acceptable, the question of intra-corporate transfers is often raised in an effort to keep a good employee. Early in the RIF planning process, an employer should decide if it will allow such transfers because doing so may create opportunities for other affected employees to claim that they should have been considered for a possible transfer or allowed to transfer too. When the person who was not transferred is in a protected class, the employer faces additional exposure to discrimination claims. Each transfer during a RIF must be scrutinized within the legal frameworks outlined in the previous sections. Often, allowing transfers during a RIF complicates an already complex process, and therefore many employers simply decide not to allow transfers even though a potentially valuable employee asset may be lost.

### ***Planning, selection, and implementation procedures***

An effective strategy for avoiding or winning RIF-related litigation is to use a high-level committee to review decision-making. Such a committee might provide a greater check on fairness by including persons other than direct management in the decision-making process. These committees also can be diverse and thus might provide a different and valuable perspective on direct supervisors' decisions. Potential jurors also might view such a committee positively when determining either liability or potential damages in a lawsuit. And, there may be a potential advantage to having several witnesses supporting the RIF selection decisions instead of a single decision-maker (particularly if the single decision-maker can be accused of bias).

At least one member of the review committee should be a human resources professional, who can ensure that the committee reviews all necessary information and applies the relevant criteria uniformly. The committee's members also should receive some training in equal employment opportunity laws and company policies in this regard. The committee should be exposed only to relevant information in terms of the selection guidelines. For example, inappropriate references in personnel files, appraisals, and other documents can be eliminated. Committee members also can be insulated from information on age, race, sex, or other protected status information. For the employer that decides to use a review committee, substantive minutes of deliberations and results must be maintained. It is virtually impossible to reconstruct the deliberations months or years after the fact. Faded and potentially conflicting memories may lack credibility and thus increase the risk of liability. For this reason, committee-generated notes and documents should be controlled and preserved with an eye toward possible disclosure in litigation.

Early in the planning process, the employer should determine which organizational units will experience position eliminations and by what percentage or number. It is important first to determine the specific positions—*not employees*—that will be eliminated. After deciding the new organizational structure, the selection criteria should be applied to determine which employees will be placed in the new organization and which will be selected for separation. Also as part of this process, individuals on leaves of absence and those who may need accommodations for disabilities should be identified, so that application of the selection criteria does not inadvertently displace such individuals without considering their legal rights.

To defend against a discrimination or wrongful discharge claim, documentation of the decision-making process is critical. Again, if a jury can see and feel the legitimate process, they are less likely to regard the employer as having acted in a discriminatory or arbitrary manner. But documentation can also sink the litigation ship. Documents that are erroneous, that conflict with the ultimate reasons for a decision, or that show bias pose major impediments to accomplishing the lawyer's goal of a RIF free of lawsuits (or at least free of major liabilities). A good way to prevent the "bad document" scenario is to utilize the attorney-client privilege.

The attorney-client privilege is a legal principle that shields from disclosure all communications to and from a lawyer when the communications are confidential and for the purpose of providing legal advice.<sup>72</sup> Communications and related documents that are subject to the attorney-client privilege cannot be discovered by the government or by plaintiffs in litigation. However, communications will not be privileged from disclosure if the privilege is waived by the person or entity seeking the legal advice. A waiver may be intentional or it may be via inadvertent disclosure of an otherwise privileged communication.

An example of a RIF-planning strategy relative to the attorney-client privilege is as follows: Decision-makers should complete a preliminary selection form for each affected position, listing the candidates, the person selected for layoff, and the reasons for the selection in accordance with established selection guidelines and criteria. The forms used by the decision-makers should not include any demographic information. Of extraordinary importance is that this form be issued and completed at the request of a lawyer and expressly for the purpose of the lawyer providing a legal opinion concerning the information on the form. This entire process must be kept confidential. The form and all communications associated with it should be labeled "privileged and confidential/prepared for consultation with counsel" and delivered to the employer's lawyers, including all drafts.

A lawyer, or a human resources representative acting for the lawyer, should then add demographic and protected class data, and note any special issues that might generate claims, such as recent FMLA leaves, disabilities, whistle-blowing activity, union organizing activity, recent harassment or other serious complaints, and complaints about supervisors and managers. The lawyer then analyzes the data for potential claims against the company. If potential claims are identified, they can be addressed and remedied in the confidential context of attorney-client communications. If

statistical disparities are identified, selection criteria can be evaluated to ensure they are job related and applied uniformly. Other criteria might also be explored to determine whether they can achieve the same business goals with a lesser impact on a protected group. If validated criteria are applied uniformly but still result in a statistically significant impact on a protected group, it is not necessary to change the decisions merely to eliminate the disparity, because the validation and auditing process should have confirmed that the underlying decisions were made on a non-discriminatory basis. In fact, manipulating the decision process merely to eliminate statistical disparities can result in reverse discrimination claims, that is, men claiming discrimination because women received preferential treatment or whites claiming race discrimination because blacks received preferential treatment. Such reverse discrimination claims are usually evaluated under the same legal standards as claims by minorities, women, and older workers.

A lawyer's review of the RIF decisions also should include identifying individuals who are more likely than others to initiate claims against the company. Decisions that negatively affect such individuals must be evaluated carefully in order to avoid or to win any potential litigation. This evaluation includes not only reviewing the legal merits of the employment decision, but also examining supporting documents, overall indicators of "fairness," the personality and potential bias of the decision-maker, and any corroborating views of supervisors and peers. Witness credibility is also evaluated (in the event a trial is required), as well as any past comments or complaints about either the decision-maker or the affected employee.

After the legal review, and after selections are finalized, decision-makers should complete a final selection form. This final form should contain the rationale for selections in accordance with the selection criteria. All relevant documentation should be included with the form, and any required reviews and approvals should be evidenced on the form. The final form will not be privileged, and will be the primary piece of evidence that the employer can use to defend the selection decision if faced with a lawsuit.

Finally, an often-neglected aspect of the RIF is the post-RIF time frame. Lawyers representing plaintiffs often focus on this time frame, searching for information that might indicate that the stated reasons for an employee's layoff are false. For example, if an employer contends that a position is eliminated, the plaintiff's lawyer might ask to review post-RIF hiring decisions. If the lawyer identifies new hires shortly after the RIF who essentially perform the plaintiff's

former duties, the lawyer may contend that the rationale for selecting the plaintiff was a sham and a pretext for discrimination. Likewise, an alleged justification for position eliminations—such as elimination of a product line or expected sales emphasis in particular products—might never materialize. When this happens, a plaintiff’s lawyer might contend that the original justification was not truthful and was instead just a cover-up for discrimination. To avoid such claims, a prudent employer might impose a prohibition on hiring into positions that were vacated during a RIF. Also, when a RIF is due to cost-cutting, an employer should freeze hiring during and after a RIF for a significant period in order to avoid a claim that the cost-reduction justification for the RIF was a sham. If business needs require hiring at some level during or after the RIF, these business needs should be reviewed, justified, documented, and approved, with a focus on achieving the organization’s business need without exposing it to potential lawsuits.

## Conclusion

In addition to the issues addressed in this article, a host of other legal issues should be considered relative to reductions in force. Employers might consider voluntary exit incentive programs, which implicate an entirely different set of procedures, laws, and regulations, before instituting involuntary programs. Common law issues, such as claims that employment contracts are breached by the RIF or that an implied contract exists requiring “just cause” for a termination must be assessed. Non-competition and confidentiality concerns also play a significant role in protecting an employer’s trade secrets and proprietary information during and after a work force restructuring. Additionally, union relations issues relative to contracting out, plant relocations, plant shutdowns, and general layoffs involve possible legal requirements that the employer bargain with a union about the business decision *before* implementing it and that the employer bargain with the union about the effects of the business decision.

The ability of human resource managers and day-to-day supervisors to comprehend and to apply a complex array of employment laws and regulations is limited. Courts are also challenged in their ability to grapple with unique employment scenarios and decisions in an ever-changing area of the law. Employment laws—statutes, regulations, and case law—have reached a level of complexity that makes it extremely difficult for employers and employees to understand their rights and obligations. When the result is litigation, one cannot help but believe that resources are unnecessarily wasted regardless of the outcome of a lawsuit.

Litigation is expensive and time-consuming, often taking years to resolve and costing tens or hundreds of thousands of dollars before achieving a resolution. Employers must pay for their own lawyers’ time and expenses, and if a plaintiff prevails in a discrimination lawsuit, the employer faces monetary damages that can include an award of lost pay and benefits, compensatory damages for emotional pain and suffering, punitive damages, and payment of the plaintiff’s attorney fees. Under Title VII and the ADA, compensatory and punitive damages are capped at \$300,000 for large employers, and although no compensatory or punitive damages are allowed under the ADEA, lost pay can be doubled as a “liquidated” damages award if a willful violation of the act is found. However, many state laws contain no such limitations on monetary awards. Clearly, six- and seven-figure jury verdicts are a real threat to employers in our federal and state jury systems, and class action claims pose the potential for even larger awards. In addition, it is difficult to put a price tag on the time spent by corporate managers away from performing their job duties in order to deal with litigation.

The inefficiencies and costs associated with court litigation could be avoided in light of the U.S. Supreme Court’s decisions that statutory discrimination claims can properly be submitted to binding arbitration and that private, mandatory arbitration agreements between employers and employees are valid under the Federal Arbitration Act (FAA).<sup>73</sup> However, under the FAA, state contract laws determine the validity of arbitration agreements (to the extent the laws are not conflicting with the FAA). Litigation related to the enforceability of arbitration agreements has resulted in different rulings among federal and state courts concerning the elements of a valid arbitration agreement. So far, many employers are still taking a wait-and-see approach to instituting arbitration programs until the law is clearer. Congress could follow the Supreme Court’s lead and take the additional step of amending the FAA to preempt all state laws concerning arbitration and to provide for the development of a national common law on the enforceability of arbitration agreements instead of relying on varying state laws. Such an amendment might also include minimum statutory standards for an arbitration agreement to be knowing, voluntary, and binding.

Because private arbitration remains underutilized and subject to continuing suspicions about individuals’ ability to vindicate important public rights in a private forum, another public policy response that might be explored is the development of a national administrative court system exclusively for employment claims.

Such a system could provide administrative judges who have expertise in employment law and the employer–employee relationship. The process could also be more efficient if the Equal Employment Opportunity Commission’s (EEOC) investigatory powers were expanded so that an EEOC probable cause finding would be required as a prerequisite for an administrative hearing. And, appeals from an administrative decision could be allowed to the federal courts, but the courts should only have jurisdiction to review the decision under a limited “abuse of discretion” or similar deferential standard. Employees would give up jury trials for their claims, but their potential monetary remedies might be maintained and their claims could be resolved more expeditiously than in the current process. Further benefits for employers would be realized if this federal administrative system were coupled with federal anti-discrimination laws becoming the legal standard for the entire country, displacing (preempting) state laws on the same subject matters. The result could be more predictable—uniform laws applied in a more efficient administrative process.

For now, however, employers face the uncertainties of a jury system and laws that differ substantially among the states. After all the complex business and

legal analyses are conducted, argued, and challenged, every employment lawyer knows that a jury’s decision will likely be governed by whether it considers the termination decision to be fair. Does the law require fairness? No. Will the judge instruct the jury that it must decide the case based on fairness? No. But fairness and witness credibility will be the difference between winning and losing a trial.

Therefore, extraordinary attention should be given to the “tone” of the entire reduction procedure and how it is conducted. In general, well-planned, “humane” procedures create less liability (especially with juries). Outplacement assistance and the availability of counseling through employee assistance plans may also tend to defuse the emotional aspects of the reductions. Ultimately, the best long-range protection is provided by soundly conceived and well-administered performance appraisal and succession planning systems that are in place before a RIF is ever needed. These systems can provide valuable data for a later restructuring or reduction in force. Moreover, where such systems are in place, employees are much less likely to be surprised by their supervisors’ opinions of their performance and thus less likely to be suspicious of the motives behind a layoff decision.<sup>74</sup>

## NOTES

<sup>1</sup>Minority Corporate Counsel–DecisionQuest Jury Survey for 2002, which can be obtained by contacting Bowne DecisionQuest at [www.decisionquest.com/site/surveys.htm](http://www.decisionquest.com/site/surveys.htm).

<sup>2</sup>*Id.* at 2001 National Law Journal–DecisionQuest Jury Survey.

<sup>3</sup>42 U.S.C. §§2000 *et seq.*; see also Reconstruction Statutes, 42 U.S.C. § 1981 (prohibiting race discrimination in the making and enforcement of contracts; applies to private work places).

<sup>4</sup>29 U.S.C. §§621 *et seq.*

<sup>5</sup>42 U.S.C. §§ 12101 *et seq.*

<sup>6</sup>29 U.S.C. §§701 *et seq.*

<sup>7</sup>29 U.S.C. § 206(d)(1).

<sup>8</sup>42 U.S.C. §§ 2000e(k), 2000e-2(a)(1).

<sup>9</sup>See, for example, California Fair Employment and Housing Act, Cal. Govt. Code § 12900 *et seq.*; Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.*; New Jersey Human Rights Act, Title 10, Ch. 3 §10:3-1 and Ch. 5, §10:5-1 *et seq.*; The Ohio Civil Rights Act, 41 ORC § 4112 *et seq.*

<sup>10</sup>*Johnson v. Kroger Co.*, 319 F.3d 858 (6th Cir. 2003).

<sup>11</sup>*Taylor v. Virginia Union Univ.*, 193 F.3d 219 (4th Cir. 1999).

<sup>12</sup>*DiCarlo v. Potter*, 358 F.3d 408 (6th Cir. 2004).

<sup>13</sup>*Schaffner v. Hispanic Hous. Dev. Corp.*, 76 F. Supp.2d 881 (N.D. Ill. 1999).

<sup>14</sup>See *Hammer v. Ashcroft*, 383 F.3d 722 (8th Cir. 2004); *Dockins v. Benchmark Communications*, 176 F.3d 745 (4th Cir. 1999).

<sup>15</sup>*Perry v. St. Joseph Regional Medical Center*, 110 Fed. Appx. 63 (10th Cir. 2004).

<sup>16</sup>See *Yates v. McDonnell Douglas*, 255 F.3d 546 (8th Cir. 2001).

<sup>17</sup>411 U.S. 792 (1973).

<sup>18</sup>*Id.* at 803; see also *Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025 (7th Cir. 1998); *Marzano v. Computer Sciences Corp.*, 91 F.3d 497 (3rd Cir. 1996).

<sup>19</sup>See, for example, *Patterson v. Avery Dennison Corp.*, 281 F.3d 676 (7th Cir. 2002).

<sup>20</sup>*Grosjean v. First Energy Corporation*, 349 F.3d 332 (6th Cir. 2003).

<sup>21</sup>*McDonnell Douglass*, 411 U.S. at 802; *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

<sup>22</sup>See, for example, *LeBlanc v. Great American Insurance Company*, 6 F.3d 836, 847 (1st Cir. 1993) (“courts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers’ nondiscriminatory business decisions.”). See also *Jones v. Unisys Corp.*, 829 F.Supp. 1281, 1286 (Dist. Utah 1993) (“... difficult business decisions had to be made by a company facing serious economic problems. ... [T]he court is

without authority to act or second guess such decision.”), *affirmed* 54 F.3d 624 (1995); *c.f. Wexler v. White’s Fine Furniture*, 317 F.3d 564 (6th Cir. 2003) (suggesting that the business judgment rule does not necessarily preclude evidence about the reasonableness of the employer’s business decision).

<sup>23</sup>*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

<sup>24</sup>*Wilson v. Firestone Tire and Rubber Company*, 932 F.2d 510, 517 (6th Cir. 1991); see *Ritter v. Hill ‘N Dale Farm, Inc.*, 231 F.3d 1039 (7th Cir. 2000) (rejecting plaintiff’s arguments that others should have been laid off instead of him).

<sup>25</sup>See, for example, *Goldman v. First National Bank*, 985 F.2d 1118-19 (1st Cir. 1993) (The least qualified employee may be laid off in a RIF even if he previously received regular pay increases and commendations.).

<sup>26</sup>See, for example, *Staples v. Pepsi-Cola General Bottlers Incorporated*, 312 F.3d 294, 300 (7th Cir. 2002).

<sup>27</sup>See *Gould v. Kemper Nat’l Ins. Cos.*, 880 F.Supp. 527, 535 (N.D. Ill. 1995).

<sup>28</sup>*Oxman v. WLS-TV*, 12 F.3d 652 (7th Cir. 1993); *Godfredson v. Hess & Clark, Inc.* 173 f.3d 365, 374 (6th Cir. 1999) (no general obligation to transfer older workers); *c.f. Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 351 (6th Cir. 1998) (ADEA violation where younger employees transferred by employer, but older employee-plaintiff not transferred).

<sup>29</sup>See, for example, *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 60 (5th Cir. 1992) (“the ADEA should not be a vehicle for judicial second-guessing of business decisions . . . . The ADEA was intended to protect older workers from discrimination, not to tenure them.”); and *Branson v. Price River Cole Co.*, 853 F.2d 768, 772 (10th Cir. 1988)(“[C]ourts are not free to second-guess and employer’s business judgment . . . it is the perception of the decisionmaker which is relevant, not the plaintiff’s perception of herself.”).

<sup>30</sup>See, for example, *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991) and *Love v. Alamance County Board of Education*, 757 F.2d 1504, 1509 (4th Cir. 1985) (noting that the “heavy presence of women and blacks” on the selection committee was significant to the issue of sex and race discrimination; a judgment for employer *affirmed*); *Wright v. National Archives and Record Service*, 609 F.2d 702 (4th Cir. 1979) (finding no Title VII violation because all five of the evaluators, three of whom were African American, agreed that Wright was not qualified).

<sup>31</sup>See, for example, *Wexler, supra*; *Strauch v. American Coll. of Surgery*, 301 F. Supp.2d 839, 849 (N.D. Ill. 2004); see also *Waldron v. SL Industries*, 56 F.3d 491 (3rd Cir. 1995) (reversing summary judgment for the employer because the fact that the plaintiff was age 61 at the time of hire and 63½ when promoted did not create a presumption of non-discrimination in favor of the employer).

<sup>32</sup>See, for example, *Wexler, supra*.

<sup>33</sup>*Allen v. Diebold, Inc.*, 33 F.3d 674 (6th Cir. 1994); See also *Thomure v. Phillips Furniture Co.*, 30 F.3d 1020 (8th Cir. 1994); *Bialas v. Greyhound Lines*, 59 F.3d 759 (8th Cir. 1995); and *Bay v. Times Mirror Magazines*, 936 F.2d 112, 117 (2nd Cir. 1991) (“[T]here is nothing in the ADEA that prohibits an employer from

making employment decisions that relate an employee's salary to contemporaneous market conditions ... and concluding that a particular employee's salary is too high.”).

<sup>34</sup>401 U.S. 424 (1971).

<sup>35</sup>See *Hazelwood School District v. United States*, 433 U.S. 299, 308-309 at note 14 (1977) (stating that only when the difference between the success rate and workforce availability is greater than two or three standard deviations while employment practices be suspect). See, for example, *Benson v. Tacco, Inc.*, 113 F.3d 1203 (11th Cir. 1997) (allowing certain plaintiffs to proceed with RIF-based discrimination claims based on standard deviations of 3.04 with 0.002 probability); *Barnes v. GenCorp*, 896 F.2d 1457 (6th Cir. 1990) (finding that a *prima facie* case was established by statistics that showed the percentage of employees at age 52 and over discharged in a RIF fell beyond three standard deviation from the hypothesized random result; the 48 and over group came close to three standard deviations; the court recognized that these statistics were based on a presumption that skills are distributed evenly by age).

<sup>36</sup>See, for example, *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 647-48 (4th Cir. 1983), reversed on other grounds, 467 U.S. 867 (1984); *EEOC v. Western Electric Co.*, 713 F.2d 1011, 1018 (4th Cir. 1983) (advising extreme caution in drawing conclusions from standard deviations in the range of 1-3).

<sup>37</sup>*Fisher v. Wayne Dalton Corp.*, 139 F.3d 1137 (7th Cir. 1998); *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743 (10th Cir. 1991) (finding statistical sample too small to raise a jury question as to the layoff in which only ten percent of the 42 geologists under age 40, but 33 percent of the nine geologists over age 40 were laid off).

<sup>38</sup>See *Teamsters v. United States*, 431 U.S. 324, 342, n. 23 (1977).

<sup>39</sup>*Kadas v. MCI Systemhouse Corporation*, 255 F.3d 359, 362 (7th Cir. 2001).

<sup>40</sup>See *Hazelwood School District v. United States*, 433 U.S. at 309 (finding that extended time frame statistics are preferable to a snapshot analysis because the work force composition evolves continually over the years).

<sup>41</sup>487 U.S. 977, 990-91 (1988).

<sup>42</sup>See *Connecticut v. Teal*, 457 U.S. 440, 442 (1982); 42 U.S.C. § 2000e-2(k).

<sup>43</sup>42 U.S.C. § 2000e-2(k)(1)(A)(I).

<sup>44</sup>*Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1468-69 (6th Cir. 1990).

<sup>45</sup>See, for example, *Meacham v. Knolls Atomic Power Laboratory*, 381 F.3d 56 (2nd Cir. 2004) (affirming employer's liability in part because it was confronted with disparate impact before implementing layoffs and did not review or validate the decision-making process properly).

<sup>46</sup>— U.S. —, No. 03-1160, 2005 WL 711605 (March 30, 2005).

<sup>47</sup>29 U.S.C. § 623(f)(1) (“It shall not be unlawful for an employer ... to take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age. ...”).

<sup>48</sup>*International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-43 (1977); *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157, 160 (2nd Cir. 1991) (statistics standing alone not sufficient).

<sup>49</sup>29 U.S.C. § 2601 *et seq.*

<sup>50</sup>See, for example, *Connecticut Family Leave Act*, Conn. Gen. Stat. § 31-51cc (providing for up to 16 weeks of leave in a 24-month period).

<sup>51</sup>*Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 160 (1st Cir. 1998).

<sup>52</sup>29 U.S.C. § 261(a)(1); 29 C.F.R. § 825.214.

<sup>53</sup>29 U.S.C. § 2614(a)(3)(B).

<sup>54</sup>29 C.F.R. § 825.216(a)(i); See *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1157 (7th Cir. 1997) (applying regulation to an individual laid off while on maternity leave).

<sup>55</sup>29 U.S.C. §§ 12101 *et seq.*

<sup>56</sup>29 C.F.R. § 1630.2(o).

<sup>57</sup>*Mathews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997).

<sup>58</sup>29 U.S.C. Section 2101 *et seq.*

<sup>59</sup>*Id.* at §§ 2101, 2102.

<sup>60</sup>29 U.S.C. §§ 2101(a)(2) and (3).

<sup>61</sup>*Id.* at § 2102(d).

<sup>62</sup>*Id.* at § 2104.

<sup>63</sup>*Id.* at § 2101(b)(2).

<sup>64</sup>*Id.* at §§ 2102(b)(1), (2) and (3).

<sup>65</sup>*Id.*

<sup>66</sup>29 U.S.C. §§ 626(f).

<sup>67</sup>*Id.*

<sup>68</sup>*Id.* at § 626(f)(1)(H).

<sup>69</sup>*Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1260 (6th Cir. 1997).

<sup>70</sup>29 C.F.R. § 1625(f)(3).

<sup>71</sup>62 F.3d 368, 373 (11th Cir. 1995).

<sup>72</sup>*Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (discussing legal standards for attorney-client privilege in a corporate investigation; also discussing attorney-work product protection, which renders confidential documents that reflect the fact or opinion work product of attorneys when litigation is anticipated).

<sup>73</sup>See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991); Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

<sup>74</sup>The views expressed in this article are solely those of the author. Many of the descriptions and principles set forth herein are generalized due to publishing constraints.