



# Workforce Realignment and Reductions in Force

Part 1: Reductions in Force

August 1, 2023

**Seyfarth Shaw LLP**

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# Speakers

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**Barry Miller**  
Partner  
BOSTON



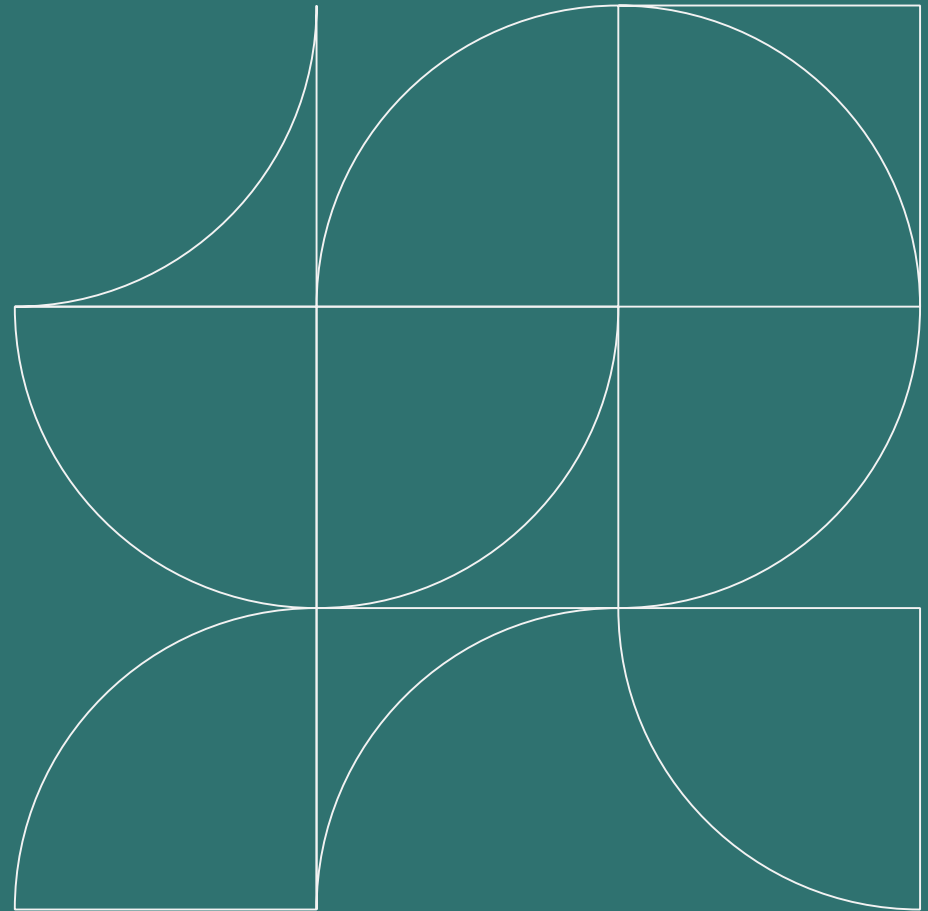
**Alex Reganata**  
Associate  
BOSTON

# Agenda

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- 01** How to Approach a Reduction In Force – Key Factors
- 02** Voluntary vs. Involuntary Terminations
- 03** Severance Pay Policies
- 04** How to Mitigate Risks

# Approaching A Reduction In Force





## How to Approach

- Identifying & Documenting Necessity of RIF
- Reviewing Existing Obligations Impacting RIF
- Drafting an RIF blueprint
  - Identify your employees
  - Develop selection criteria
  - Create review committee / pressure test





## Identifying and Documenting Necessity

- Legal considerations: a well explained RIF is a facially legitimate, non-discriminatory, non-retaliatory reason for termination
- Examples of necessity:
  - Discontinuing line of business
  - Consolidating offices
  - Responding to a change in market conditions
  - Automation
  - Reduce costs
  - Improve efficiency

# Reviewing Existing Obligations Impacting RIF

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Existing policies or agreements may limit ability to conduct RIF, or shape how a RIF is done.

- Is there a union involved?
- Have key polices and documents been reviewed?
  - Employment agreements and offer letters
  - Handbooks, historical procedures
  - Severance policy





# Drafting an RIF Blueprint

## Identify scope of potentially impacted group

- Joint employment / independent contractor issues
- Agency Temps / outsourced workers / on-demand service providers

## Develop selection criteria

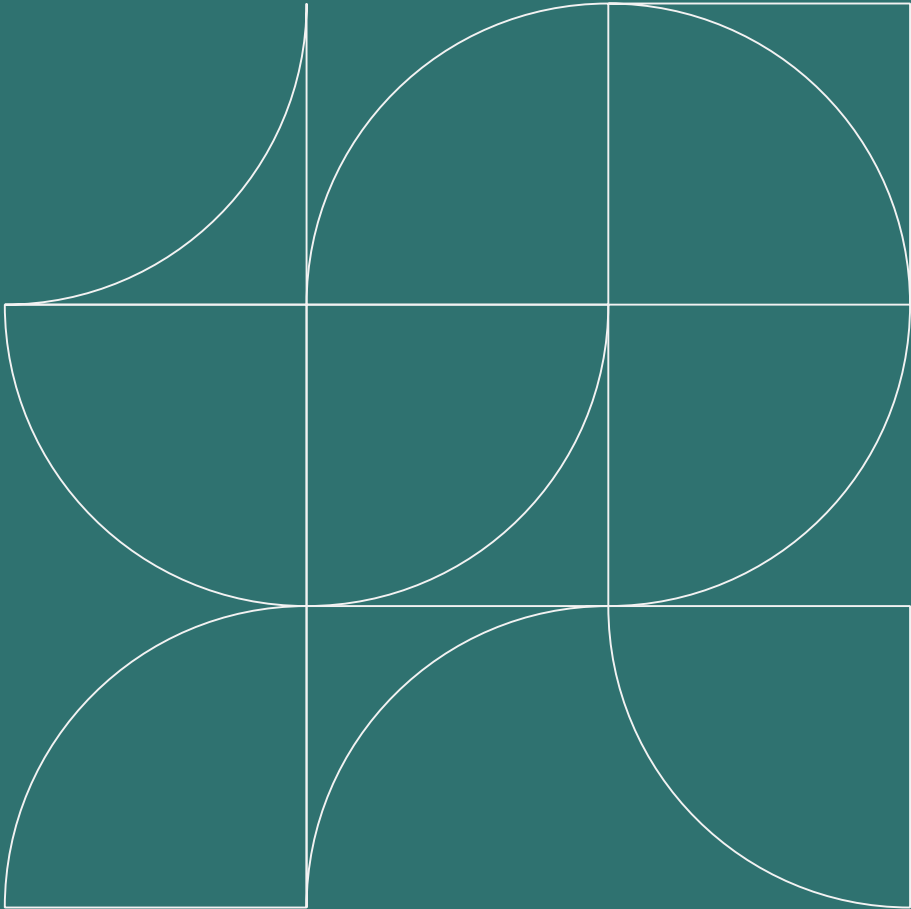
- Focus on objective criteria; **functions** affected, not **persons**
- Avoid using salary level as direct reason
- Align criteria to stated justifications of RIF

## Consider review committee

- Process: only keep notes of decisions, not deliberations
- Purpose: make final decisions on individual terminations
- Composition: Consider demographics of Committee
- Confidentiality: provide only relevant data to Committee



# Voluntary v. Involuntary Terminations



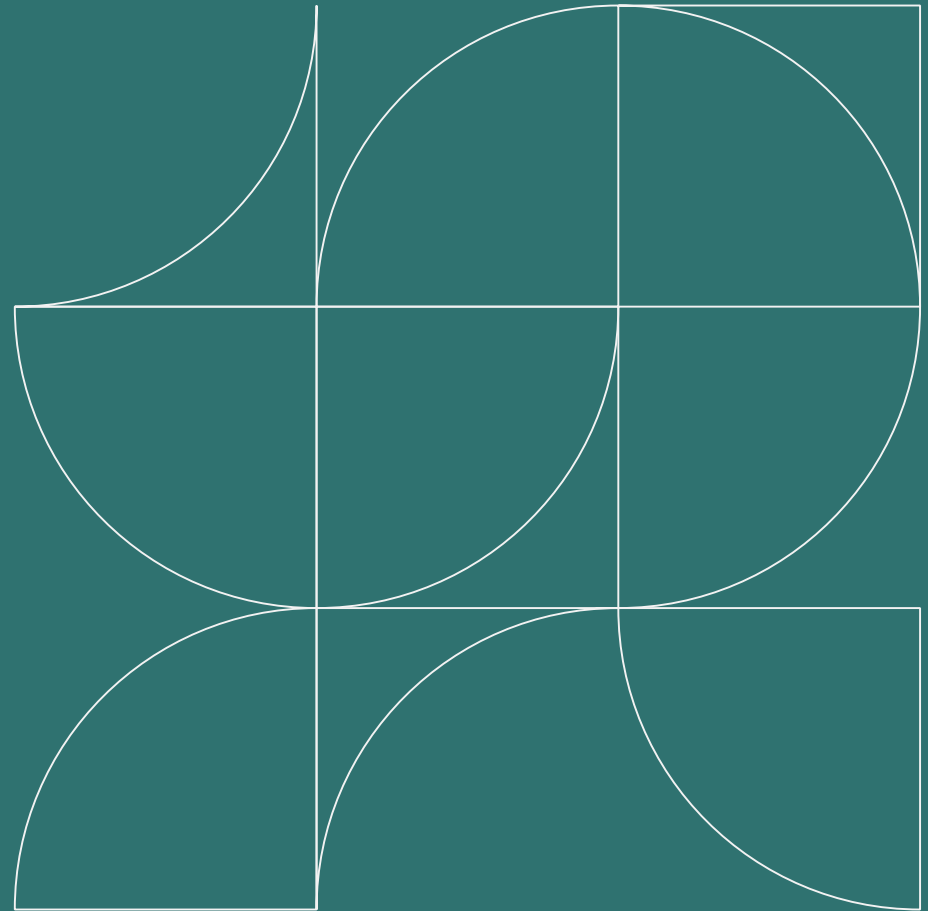


## Voluntary v. Involuntary

- Voluntary
  - Employees self-select to receive severance and leave the company
  - Reduces litigation risk...
    - ...if not offered in a discriminatory way!
- Involuntary
  - Company selects the employee
  - Business needs might require

Can combine both – the RIF process must be tailored to the unique contours of your business

# Severance Pay Policies



# ERISA Severance Pay Plans

## Advantages

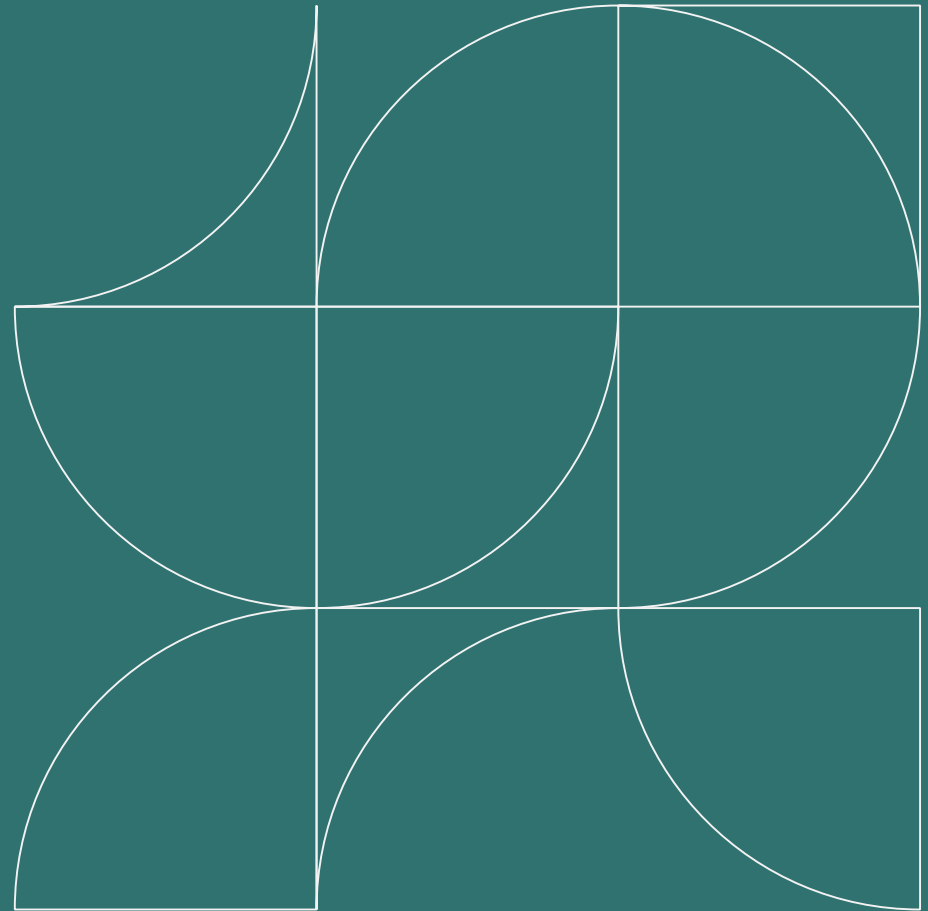
- Entitlements and processes may be pre-scripted in advance of RIF
- Cheaper dispute resolution
  - No State/common law claims
  - Damage limits
  - Federal court instead of state court
  - No jury trials
  - Less discovery
  - Better standard of review “arbitrary and capricious”

vs.

## Disadvantages

- Required written severance plan and summary plan description, providing less flexibility
- Required to give written plan to employee
- Annual reporting requirement (form 5500) if severance plan covers 100 or more participants
- Provides for attorney fees if claimant prevails
- No EEO claim protection

# How To Mitigate Risks





## How to Mitigate Risks

- ERISA Severance Pay Plans
- Disparate Impact Analysis
  - Getting results in time
  - Know what the numbers mean
  - Maintain attorney-client privilege
  - Analyze results - adjust RIF criteria?
- Release Agreements
  - Group releases (OWBPA)
- WARN Act (preview)



**RIF DISPARATE IMPACT ANALYSIS**

CONFIDENTIAL -- DO NOT FORWARD

ATTORNEY-CLIENT PRIVILEGED

Employer: ABC Company  
 Location/Unit/Department: Chicago  
 Planned Notification Date: Friday, January 09, 2009

Scenario: 1

Age Calculated as of: 1/2/09

A	B	C	D	E	F	G	H	I	J	K	L	M	Options to Remove Disparity**		
inProtected Groups Analyzed	Protected Employees	Protected Terms	Protected Selection Rate	Non-Protected Employees	Non-Protected Terms	Non-Protected Selection Rate	Total Employees	Total Terms	Total Selection Rate	Fishers Exact Test (small groups)	Standard Deviation Test	Significant? (SD +/- 1.96 or Fishers < .05)	1 Decrease Protected (and Total) Terms by...	2 Increase Non-Prot. (and Total) Terms by...	3 Swap "___" Prot./ Non-Prot. Terms
Age 40↑ v. ↓Age 40	600	75	12.5%	400	25	6.3%	1000	100	10.0%	n/a	3.23	Yes	17	10	6
Age 50↑ v. ↓Age 50	150	25	16.7%	850	75	8.8%	1000	100	10.0%	n/a	2.95	Yes	5	19	4
Age 60↑ v. ↓Age 60	50	10	20.0%	950	90	9.5%	1000	100	10.0%	n/a	2.42	Yes	2	15	1
Female v. Male	400	30	7.5%	600	70	11.7%	1000	100	10.0%	n/a	-2.15	Reverse	-2	-3	-1
	Protected Employees	Protected Terms	Protected Rate	White Employees	White Terms	White Selection Rate	White + Protected Employees	White + Protected Terms	White + Protected Selection Rate						
Asian v. White	25	13	52.0%	800	65	8.1%	825	78	9.5%	n/a	7.38	Yes	9	201	8
Black v. White	50	15	30.0%	800	65	8.1%	850	80	9.4%	n/a	5.14	Yes	7	85	7
Hispanic v. White	100	2	2.0%	800	65	8.1%	900	67	7.4%	n/a	-2.20	Reverse	-7	-49	-13
Nat Amer v. White	10	2	20.0%	800	65	8.1%	810	67	8.3%	n/a	1.35	No			
Pac. Islander v. White	0	0		800	65	8.1%	800	65	8.1%						
2 or More v. White	15	3	20.0%	800	65	8.1%	815	68	8.3%	n/a	1.65	No			
Total Minority v. White	200	35	17.5%	800	65	8.1%	1000	100	10.0%	n/a	3.95	Yes	10	98	8

\*\*Options to Remove Disparity are shown to further understanding of calculations. Protected class members should not be disadvantaged in order to reduce adverse impact against other protected classes.



## Disparate Impact Analysis

- RIF creates exposure to Title VII (women and minorities) and ADEA (age 40 and above).
- Analyze results and pressure test – require justification of selections
- Confirm decisional unit issues
  - “In-scope” vs. “out of scope” population
  - Multi-department/multi-location considerations
- Confirm data integrity
- Consider revisiting unsupported decisions / pulling back and using a voluntary plan



## Release Agreements

- Confidentiality clause appropriate?
- Restrictive Covenants?
- Releasing age claims (OWBPA)
  - Time restrictions (21 days to consider, (45 if group), 7 days to revoke)
    - Changes to terms of waiver may restart clock
  - Write in plain English
  - Specifically refer to ADEA
  - No release of future claims
  - Advise consultation with own attorney
  - Create OWBPA list

# Sample OWBPA Disclosure

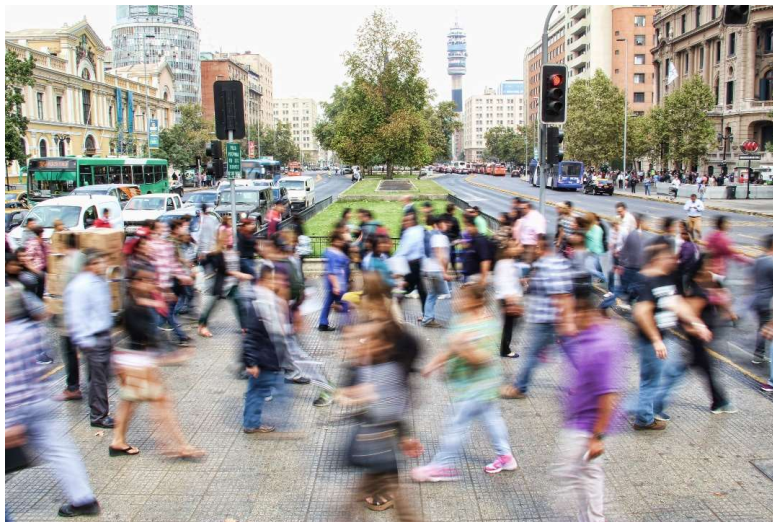
Pursuant to the Older Workers Benefit Protection Act, this is a list of the job titles and ages of the employees in the ABC Company's Human Resources Department as of February 24, 2015, who were selected and not selected for termination effective March 1, 2015. ABC Company selected employees for termination on the basis of business needs, job requirements, and comparative skill sets. Selected employees are eligible for severance based on criteria in the ABC Company's Severance Plan.

Job Title	Age as of Date Selected	Age as of Date Not Selected
Area HR MgrEmployment		44, 57
CoordinatorHR		29
AdministratorHR		28, 51
Coordinator - AssocHR		25, 26, 30, 52, 58
Coordinator - IntHR	29, 44	28, 29, 29, 32, 38, 42, 53, 53, 61
Coordinator - LeadHR		49
Coordinator - SrHR		25, 29, 30, 37, 40, 41, 42, 51, 52, 53, 53, 60, 62
HR Generalist I	31, 39, 41, 53, 53, 62	30, 34, 35, 36, 38, 41, 42, 43, 46, 49, 50, 50, 50, 53, 54
HR Generalist II	37, 43, 56	33, 35, 39, 42, 43, 49, 49, 57, 61
HR Representative I		57
HR Representative II	61	35, 41, 48, 50, 59, 62
HR/Payroll Coord – Int		26, 29, 31, 31, 45, 45, 59
HR/Payroll Coord – Lead Lead		48, 66
Manager Division Human Res		33, 47, 47, 53, 55, 60
Sr HR Generalist		34, 40
Vice President HR/A	42, 49, 49, 51, 51, 54, 54, 58, 59, 66, 67	33, 38, 39, 39, 40, 40, 40, 40, 43, 44, 47, 49, 49, 51, 52, 52, 53, 53, 53, 54, 54, 56, 57, 61, 65
Vice President HR/B	36, 52, 53	30, 37, 38, 40, 43, 44, 47, 47, 51, 53, 57, 57, 58, 62

# WARN Act

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- Applies when there is a “mass layoff” at a “single site”
- Federal WARN Act, and “mini” State-specific WARN Act’s
- It is a notice requirement – not severance pay statute
- Why should businesses care? Damages = pay + benefits + penalty + attorney’s fees





# Upcoming Webinars in the Series

## Part 2: Separation Agreements in Light of McLaren

**Thursday, August 31, 2023**

1:00 p.m. to 1:30 p.m. Eastern  
12:00 p.m. to 12:30 p.m. Central  
11:00 a.m. to 11:30 a.m. Mountain  
10:00 a.m. to 10:30 a.m. Pacific

**Speakers:**

[Molly Mooney](#), Associate, Seyfarth Shaw

[Chris Kelleher](#), Associate, Seyfarth Shaw

## Part 3: WARN Act Issues

**Wednesday, September 27, 2023**

3:00 p.m. to 3:30 p.m. Eastern  
2:00 p.m. to 2:30 p.m. Central  
1:00 p.m. to 1:30 p.m. Mountain  
12:00 p.m. to 12:30 p.m. Pacific

**Speakers:**

[Jean Wilson](#), Senior Counsel, Seyfarth Shaw

[Alex Reganata](#), Associate, Seyfarth Shaw

## Part 4: Using AI/Technology in RIFs

**Wednesday, October 18, 2023**

1:00 p.m. to 1:30 p.m. Eastern  
12:00 p.m. to 12:30 p.m. Central  
11:00 a.m. to 11:30 a.m. Mountain  
10:00 a.m. to 10:30 a.m. Pacific

**Speakers:**

[Barry Miller](#), Partner, Seyfarth Shaw

[Molly Mooney](#), Associate, Seyfarth Shaw

# Thank You

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