

**WHEN THE GOING GETS TOUGH, WHO GETS
GOING?: EMPLOYMENT LAWS AFFECTING
STAFFING OPTIONS**

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**Furloughs
and
Reduction In Hours**



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Furloughs and Reduction in Hours

- Hourly (non-exempt) employees:
 - can reduce hours below 40 in a week
 - caution – don't reduce below benefits coverage requirement

- Salaried (exempt) employees:
 - Issue: loss of exemption if reduce pay based on variation in quantity of work
 - 2nd Issue: in Missouri, must give 30 days' notice of reduction in pay
 - An exempt employee who works any part of a week must be paid for entire week
 - Alternatively, an employer does not have to pay an exempt employee for a week in which no work is performed

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Furloughs

- Employer may take salary deductions for one or more full days of missed work if the employer seeks volunteers to take time off due to insufficient work and an exempt employee volunteers to take days off for personal reasons (other than for sickness or disability)
 - Exempt employee's decision must be completely voluntary
- See DOL Fact Sheet #70 at
<http://www.dol.gov/whd/regs/compliance/whdfs70.pdf>

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Reductions in Pay and Hours

- Employer may reduce an exempt employee's predetermined salary amount and hours during a business or economic slowdown without destroying the employee's exempt status, if the reduction:
 - Is prospective
 - Is bona fide and not intended to evade salary basis requirements
 - Reflects long-term business needs
 - Does not bring salary below the minimum exemption threshold (\$455 per wk/\$23,000 per yr)
- Note: Different rules may apply to public CAAs

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Reductions in Force

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Reductions in Force

- **Types**

- Voluntary separation programs – “early retirement”

- May offer enhanced early retirement benefits
 - May offer “bridge” programs – replace social security for a time
 - Can set minimum age limits, not maximum
 - Reset retirement qualification “triggers”
 - Estimate number of eligible individuals

- Involuntary, or mandatory, separation

- Focus of discussion
 - Seek legal advice early rather than late

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Reductions in Force

- **Job Restructuring Committee**

- Small group – pledged to confidentiality
 - Will oversee the process and coordinate various steps
 - Develop objectives
 - Consider alternatives
 - Reasons
 - Examples
 - Draft and approve internal document – the RIF Statement

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Reductions in Force

- **The RIF Statement**
 - Internal – not for distribution
 - Otherwise known as "Exhibit A"
 - Purpose
 - Paper trail
 - Explain the RIF process, reasons, benefits
 - Components
 - Economic justification – "business judgment"
 - Criteria for selection (more later)
 - Departments or units involved
 - Recitation of goal
 - Description of benefits

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Reductions in Force

- **Criteria for selection**
 - Objective is better, e.g.
 - Education, licensure, other skills
 - Attendance
 - Length of service – overall and in position
 - Ability to perform other workplace tasks
 - Quantifiable standards of performance, productivity
 - Seniority
 - Need in position
 - Documented performance (quasi-objective)

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Reductions in Force

- Subjective – more easily challenged
 - Create guidelines to quantify
 - Attitude
 - Cooperation
 - Team player
- Decision-makers must be able to make impersonal, unbiased decisions

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Reductions in Force

- Decision-making
 - Decide who makes the initial decision
 - ♦ Determine level of supervision
 - ♦ Make sure all use same criteria
 - ♦ Compile initial list
 - Have statistical analysis done of current workplace
 - ♦ Age, gender, national origin, race
 - ♦ Compare composition before and after projected RIF

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Reductions in Force

- Have a second level of review
 - Consider statistical impact (above)
 - Reconsider initial selections if disproportionate impact
 - Were criteria observed
 - Consider special issues, protected classes
 - Overall fairness
- Final decision

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Reductions in Force

- Other consideration
 - Will severance benefits be offered in exchange for release
 - ◆ More later
 - ◆ Get documents drafted and ready for use
 - Prepare information, or summary, sheet as handout at termination meetings
 - Plan day of termination – teams, timing, process, packets, etc.
 - Utilize a script for termination meetings – consistent message is the goal

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WARN Act

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WARN Act

- WARN is the Worker Adjustment and Retraining Notification Act
- Purpose: Offers protection by requiring 60 days' notice of certain layoffs

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WARN Act

- **Employer Coverage:**

- Those with 100 or more employees
- Don't count those who worked less than 6 of the last 12 months
- Don't count those who work less than 20 hours/week
- Applies to all employees except federal, state and local governments providing public services

- **Employee Coverage:**

- Includes hourly and salaried workers
- Includes managers and supervisors

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WARN Act

- **60 day notice triggered by**

- Plant Closing
- Mass Layoff

- **Plant Closing**

- A site closure (or closure of one or more facilities or operating units at an employment site)
- Resulting in an "employment loss" (defined later)
- For 50 or more employees during a 30 day period

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WARN Act

- **Mass Layoff**

- Less than a plant closure
- Results in “employment loss” for 500+ employees, or
- Employment loss for 50-499 employees if at least 1/3 of workforce

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WARN Act

- **Aggregation**

- Rules to avoid circumvention of notice requirement
- Mandatory 60 day window – 30/30 – separate and distinct layoffs
- Potential 180 day window – 90/90 – if none of the layoffs within 90 day period are separate and distinct

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WARN Act

- **“Employment loss” means**
 - Employment termination – other than for cause, resignation or retirement
 - Layoff exceeding 6 months
 - Reduction in hours of more than 50% for 6 months
- **Not included as an “employment loss”**
 - Transferees to different site within “reasonable commute”
 - Transferees to a site outside of a “reasonable commute” who accept within 30 days of offer or event
 - Provided not more than 6 month break in employment

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WARN Act

- **Exemptions**
 - If closed facility was temporary
 - If event was result of project completion
- **Exceptions to 60 day notice requirement**
 - Faltering company
 - Unforeseeable business circumstances
 - Natural disaster
- **Penalties**
 - Owe back pay and benefits to all for up to 60 days
 - Civil penalty – up to \$500

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WARN Act

- **Notice to Who?**

- Chief elected officer of bargaining group, if any
- Individual workers
 - Even those uncounited to determine coverage, i.e.,
 - Those who worked less than 6 of last 12 months
 - Those who work less than 20 hours
- State dislocated worker unit
- Chief elected official of unit of local government in which employment site is located

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Severance Agreements

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Severance Agreements

- **Severance Agreements**
 - Purpose
 - ◆ Provide extra benefits
 - ◆ Obtain a release
 - Plan, policy or procedure – history of severance
 - ◆ Provide what otherwise not entitled to
 - ◆ Consistency – avoid discrimination claims
 - What will you offer
 - ◆ Pay, subject to withholding
 - Amounts, maximums, minimums
 - ◆ Benefits, subsidies
 - ◆ Outplacement

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Severance Agreements

- Severance pay is allowable under OMB Circular A-122 only where it is required by (2 C.F.R. § 230, App. B, §8.k):
 - law;
 - an agreement between the employer and the employee;
 - an established policy that constitutes, in effect, an implied agreement on the organization's part; or
 - the circumstances of the particular employment.
- For severance payments to employees leaving voluntarily:
 - Plan ahead and adopt a policy or
 - Enter into an agreement with employee (preferably at the beginning of his/her employment) detailing severance arrangement.
- Super Circular provision, 2 C.F.R. § 200.431(i), basically same as OMB Circular A-122

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Severance Agreements

- For those under 40
 - OWBPA does not apply
 - Reasonable time to consider
- For 40 and above
 - Protection under ADEA
 - The OWBPA applies
 - Strict requirements for release to be enforceable

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Severance Agreements

- OWBPA requirements
 - Reference release of rights under ADEA
 - Release can't extend to later claims
 - Consult with an attorney before signing
 - 21 or 45 day consideration period
 - 7 day revocation period
 - "Knowing and voluntary" – plain language

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Severance Agreements

- Additional OWBPA limitations
 - Can't waive right to file EEOC Charge
 - ◆ However, can waive right to seek or recover money
 - Can't require "tender back" if Charge or lawsuit
 - ◆ Must allow challenge of waiver
 - ◆ Employer can raise waiver as affirmative defense
 - ◆ Can offset if recovery

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Severance Agreements

- Group reductions in force
 - 45 day requirement
 - Additional information requirements
 - ◆ Class, unit or group covered by program
 - ◆ Eligibility factors
 - ◆ Time limits
 - ◆ Job titles and ages of those selected
 - ◆ Job titles and ages of those not selected
 - Pay on or about 10th day

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Questions and Answers

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