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AGE DISCRIMINATION:  
The New Frontier For Aging Boomers —  
Defenses in Age Discrimination Lawsuits

By

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¹ The views expressed are solely those of the author and should not be attributed to the author's firm or its clients.
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Yogi Berra once noted that "It was impossible to get a conversation going, everyone was talking too much." In some respects, the U.S. federal Age Discrimination in Employment Act ("ADEA"), insofar as it protects individuals over forty in the United States, provides a situation which creates a dilemma too, due to longevity in the workforce. This can be evaluated in the following context:

A. Individuals who entered the workforce in the 1960s, before the passage of civil rights and employment laws providing protective status for minorities and females and various protected conditions existing today, may now be in the mid-sixties to their mid-seventies. They, in certain respects, are "grandfathered" into the workforce, because of age protection laws, even though when they entered the workforce they were the beneficiaries of the prior discrimination (corrected by laws enacted only subsequent to their employment). There is no question that under the laws of the United States at the federal and state level, which are discussed below, such individuals are entitled to protection against age discrimination when they have the ability to do the job. However, to the degree that individuals have that ability, their age group may include fewer females and minorities.

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B. Individuals over forty can work longer, and since there are no outside limits to protection against age discrimination under ADEA. Their health may keep them in the workplace, even if they are in their sixties and seventies, for some years to come.

C. Because of economic difficulties (not only around the turn of this century, but in 2008), many workers who would have retired have found that they cannot retire. Their investments, pensions, various benefit programs and health programs are insufficient to enable them to retire, as they might have planned. Their ability to remain in the workforce is matched by their desires due to their economic needs.

D. Many individuals over forty may have parents who have lived longer too; their parents may be the beneficiaries of those older workers in the workforce. Thus, some over forty, including those who are working way beyond forty, must stay in the workforce to protect their parents. Often they also may be sending children through school or, even if their children have graduated, they may be the support for their children (because of the economic downturn and inability of individuals leaving educational systems to obtain work).

E. Because of their age, many working may choose not to leave jobs, even when they can obtain entitlements or separation incentives, because they feel that they may not obtain other employment, or comparable wages and benefits if they do find other work.

F. Because such older workers may have achieved seniority and higher wages in the workforce, and because their health needs may increase with age (causing them to be more dependent upon benefit programs), they may use such programs at increased costs to their employers.

G. As a result of efforts to reduce costs by reductions-in-forces and, also, desires to start new workers at lower wage levels with fewer benefits, there may be increased tension in the workforce. The older workers, because of their economic needs and their protection against age discrimination, may be more militant in resisting buyouts, or reductions-in-forces. And there may be increased tension because of the fact that in most diverse workforces, the juxtaposition of
the different interests (even if all can perform work in a similar fashion, and have the same skills) may involve too many employees chasing too few positions.

In this context, the outline below discusses the ADEA provisions, which include defenses and compliance requirements, which if followed will be defenses and specific defenses that relate to age discrimination litigation and then defenses relating to the reduction-in-forces process.

II. **ADEA: The U.S. Federal Age Discrimination Law**

A. Sources of Protection and Release and Waiver Defense Requirements

1. The Age Discrimination in Employment Act, 29 U.S.C. §621-634. The Age Discrimination in Employment Act of 1967 ("ADEA") prohibits discrimination against individuals who are at least 40 years of age in private and public employment. There is no upper age limit. There was initial protection in 1967 between the ages of 40 and 65, which was raised to 70 in 1978 and discarded completely in 1986. ADEA is a federal law. Some states and their political subdivisions (or local governments) also have age discrimination prohibitions and many state laws do not have any lower or upper age limit. ADEA covers hiring, termination, compensation, terms and conditions or privileges of employment.

2. The Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. §626(f). The Older Workers Benefits Protection Act of 1990 amended ADEA, among other reasons, to permit employees to waive their rights and claims under ADEA and to enact safeguards that such waivers are "knowing and voluntary." Knowing and voluntary requires that:

   a. the waiver must be part of a written, clearly understood agreement between the employee and the employer;
   b. the waiver must specifically refer to rights or claims arising under ADEA;
   c. rights and claims arising after the date of the waiver may not be claimed;
   d. rights and claims can be waived only in exchange for considerations in addition to anything of value to which the employee is already entitled;
   e. written advice to consult with an attorney must be given;
   f. a period of 21 days must be given for the employee to consider the agreement or, if a waiver is in connection with an exit incentive or other employment termination program offered to a
group (two or more employees) or class, at least 45 days must be
given to consider the agreement (the employee may offered these
required periods may waive them); and

the waiver must provide for at least seven days during which the
employee can revoke the agreement (the employee cannot waive
the seven day revocation period).

B. The Purpose of Protection

The purpose of the ADEA is “to promote the employment of older persons based
on their ability rather than age; to prohibit arbitrary age discrimination in
employment; [and]to help employers and workers find ways of meeting


1. Protected: Individuals Age 40 and Above

2. Exemptions for:
   a. Certain Military Personnel and Executives
   b. Independent Contractors and Partners in a Bona Fide Partnership

D. Covered Entities

1. Private Employers, 29 U.S.C. §630(b)


3. State and Political Subdivision (Local Governments), 29 U.S.C. §630(b)

4. Labor Organizations, 29 U.S.C. §630(d), (e)


6. Employment Agencies, 29 U.S.C. §630(c)


F. Procedural Issues Unique to Age

1. Filing with the EEOC
   a. The Charge
   b. 180/300-Day Time Limit
c. Determining When Discrimination Has Occurred
d. Tolling of the Limitations Period
e. EEOC Conciliation

2. Filing a Charge With the State FEP Agency

3. Filing a Charge with a State Political Subdivision (County or Municipality)

G. Individual Actions Under the ADEA

1. Private Right of Action

2. Time for Filing Suit

3. Scope of Suit

H. Representative Actions Under the ADEA

1. Introduction

2. Standards for Determining Representativeness

3. Adequacy of the Original EEOC Charge as Jurisdictional Basis for Opt-Ins

4. ADEA Trial Structure for Representative Actions

5. Applicability of Rule 23 Procedures to Federal Employees

I. Jury Trial

J. Arbitrations

K. Proof Issues Unique to Age Cases

1. Disparate Treatment

   a. The Plaintiff's Prima Facie Case
      (1) Plaintiff's Qualifications
      (2) Selection or Retention of Someone "Younger"
   b. Defendant's Articulation of a Legitimate, Nondiscriminatory Reason
   c. Plaintiff's Proof of Pretext
   d. Adverse Impact
2. Adverse Impact

L. Affirmative Defenses

1. Statutory Defense

2. Reasonableness Factors Other Than Age (RFOA)

3. Bona Fide Occupational Qualification (BFOQ)

4. Bona Fide Employee Benefit Plan
   a. Early Retirement Incentives
   b. Pensions
   c. Severance Benefits
   d. Disability Benefits
   e. Health Insurance

5. Bona Fide Seniority System

6. Settlement and Release

7. Good Faith Reliance on Administrative Actions

8. Other Defenses
   a. Mootness
   b. Seniority
   c. Informal Complaint Systems (*Faragher-Ellerth*)
   d. Arbitration
   e. Pleading defenses (*Twombly* and *Iqbal*)
   f. Constitutional issues

M. Remedies


2. Equitable and Declaratory Relief
   a. Injunctions and Declaratory Relief
   b. Reinstatement and Instatements

3. Back Pay

4. Front Pay

5. Liquidated Damages
6. Compensatory Damages

7. Punitive Damages

8. Attorney’s Fees

9. Prejudgment Interest

N. ADEA and the ADA and FMLA and ERISA

O. International Applications, Limitations and Defenses

1. U.S. Employers Overseas. Employers operating outside the United States may be subject to the ADEA with respect to U.S. citizens if the employer is a U.S. company, a joint employer with a U.S. company (a foreign branch of a U.S. company), or a foreign corporation controlled by a U.S. employer. 29 U.S.C. §623(h). If a U.S. employer owns or controls a corporation incorporated in a foreign country, the U.S. employer can be held liable for age discrimination committed by the foreign corporation. There is no violation, however, when a U.S. employee is in a workplace in a foreign country and compliance with the ADEA would cause the employer to violate the laws of that country. 29 U.S.C. §623(f)(1). In Mahoney v. RFE/RL, 47 F.3d 447, 67 FEP Cases 170 (D.C. Cir. 1995), the court ruled that the foreign laws exception to the ADEA applied since a U.S. employer in Germany would have to breach a collective bargaining agreement with foreign unions providing for mandatory retirement at age 65. To comply with the ADEA, the employer would be required to violate German laws enforcing the contract as well as decisions of the German labor court; therefore the employer was not liable under the ADEA as to U.S employees forced to retire at age 65 pursuant to the labor contract. There are an EEOC Policy Guide on ADEA’s Foreign Laws Defense and an EEOC Policy Guide on Application of ADEA and Equal Pay Overseas.

2. Foreign Employers. The ADEA in general applies to foreign employers operating inside the United States, with the possible exception of when a treaty is involved, according to the EEOC. EEOC Policy Guide on Application of ADEA and Equal Pay Overseas. The Second Circuit ruled in Morelli v. Cedel, 141 F. 3d 39, 76 FEP Cases 709 (2d Cir. 1998) that complying with U.S. employment law is a part of the obligation imposed on entities that operate within U.S. borders. Foreign corporations are subject to the ADEA just as they are subject to Title VII and foreign employees of foreign corporations can be counted along with U.S. workers for purposes of determining whether the employer meets the ADEA’s 20-employee minimum, an appeals court ruled. In Gazder v.
Air India, 574 F.Supp. 134, 33 FEP Cases 427 (S.D.N.Y. 1983), a federal district court ruled that a foreign corporation wholly owned and controlled by a foreign government is subject to the ADEA when engaged in commercial activity within the United States. In MacNamara v. Korean Airlines, 863 F.2d 1135, 48 FEP Cases 9890 (3d Cir. 1988), the Third Circuit ruled that a U.S.-Korean friendship, commerce and navigation treaty (identical in relevant part to one with Japan and several other countries)—that permits companies of either country to engage executive personnel “of their own choice” in the other country and creates a limited privilege to hire noncitizens—provided a narrow exemption from laws that prohibit discrimination on grounds unrelated to citizenship. A Korean-owned company was subject to Title VII and the ADEA, and could not purposefully discriminate on the basis of age, race, or national original, the appeals court held. However, the Court ruled that disparate impact liability may not be imposed on foreign employers for engaging their own nationals or managers under such treaties.

III. REDUCTIONS-IN-FORCES:

Set forth below is an outline of considerations in connection with reductions-in-forces (which may be temporary layoffs or termination of employment). The reason for this overview in connection with the discussion of age discrimination is that older workers tend to be “grandfathered” into the workforce, as noted. Since they are protected by age and, as noted, may be the beneficiaries of pre-employment law discrimination (hired into predominantly white male dominated U.S. workforces prior to passage of civil rights and employment laws), they provide unique issues as discussed. See Introduction. When older workers’ rights are evaluated, they have to be evaluated in the context of a number of other laws. Although many U.S. jurisdictions provide for employment “at-will” all employees may be or may assert they may be in protected categories and interest groups created by overlapping labor and employment laws. Below is an outline of such other laws, and some considerations which may enable mitigation of issues and defenses:

Overview

1. Some reductions eliminate the total workplace and, as a result (unless there are other operations which arguably are left in place, and could be the basis for claiming some type of discrimination claims due to selections of some, but not all, employees for layoffs) by virtue of the location shutdown, the employer may not have as many risks. Exceptions may be plant
closures due to anti-union motives. Assuming a shutdown (as noted below) of the entire or larger part of the operation, the employer should consider the following:

A. **Federal Law.** The primary federal law to consider relating to reductions is the Worker Adjustment and Retraining Notification Act ("WARN"), which (on a simplified basis) requires that if the entity has more than 100 employees, and 50 or more employees are going to lose their jobs, there be notice or, in lieu of the notice, pay for the 60 days that the WARN notice would be applicable. This may relate to plant closures or layoffs. There also has to be notification to unions, to employees, to the appropriate state and regional and local and country governmental entities, in accordance with the WARN formula.

B. **State Law.** State laws may also impact the ability to shut down an operation. Some states may have "little WARN acts." Other states may have other laws that relate to payments. In some states, accrued wages for paid time off ("PTO") (such as vacations and sick leave) must be paid, and in other states, unless there is a contract stating that wages have to be paid for accrued items (such as vacations), there may be the ability to contract to provide PTO so that employees have to use the PTO, or they lose it. There may be other state laws that relate to reductions-in-force, even where there is a total reduction and elimination and shutdown (for example, based on safety issues regarding certain operations inherently dangerous if not staffed or guarded).

C. **Local Law.** Some local jurisdictions at the county or municipal level may have laws that affect rights of those laid off to be paid.

D. **Judicial Decisions.** There are certain judicial decisions, which require that there be pay in lieu of notice. As an example, in Florida, there are some appellate districts in certain locations of the state which have reached the conclusion that when employees are terminated, they are entitled to two weeks' notice, or two weeks' pay in lieu of notice.\(^2\) When the money is not paid, some plaintiff attorneys then assert that there has been a failure to pay the required wages (so as to enable them to trigger utilization of a statutory provision which allows for attorneys' fees when suing for "wages," no matter what the amount). There is also the risk

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\(^2\) See, e.g., Malver v. Sheffield Industries, Inc., 462 So. 2d. 567 (Fla. 3rd D.C.A. Fla. 1985) ("Because the contract of employment was of indefinite duration, it was terminable at will. Smith v. Piezo Technology & Professional Administrators, 427 So. 2d. 1832 (Fla. 1983). However, Sheffield, the employer, was required under law to give Malver reasonable notice of termination. Perri v. Byrd, 436 SO. 2d. 359 (Fla. 1st D.C.A. 1983).") In Perri, supra, at 361, the court ruled "...the contract was terminable at will subject to the requirement of reasonable notice" and due to what was "customary in this business" two weeks’ notice was required.)
that employees may argue that a sum accrued is wages, or the risk that employees may go to "small claims courts," where judges may not be as inclined to want to follow the law as to provide what they regard as "justice." The small claims court judge who states that "this is not a case where I am going to follow the law and grant a motion to dismiss, but rather shall have a hearing and then do what is just" may mean that the law is included in "what is just," but, also, mean that the expense of defending against a claim may be more than the amount of the claim.

2. Certain reductions-in-force are not total. There may be continuing operations in different locations or a partial reduction in a single location. One location out of many may be shut down, and if it is shown that such a location has been selected because of some reason prohibited by the federal or state or other laws, then there may be problems. Examples are:

A. Selection certain plants or locations for shutdown issues: Shutting down the plant solely because the pensions were too rich and the employees were too old, and there is declared intent to discriminate on account of age, may trigger ERISA and age discrimination claims.

B. Selection specific employees at a single location for reductions in force: Selecting those to be laid off—even at a single location—may involve (especially where there is a diversified workforce based on compliance with all of the employment laws) impacts that are going to only be seen after the layoff numbers are reviewed. In those cases, it is best in engage in a review of what jobs have to be eliminated and what that will mean in terms of impacting individuals who are protected. If the entire workforce is going to be impacted, there is less of a chance of a problem, but where you leave 10% of the employees working, the 90% that have been selected for reduction may fall into categories which may be inconsistent with compliance with certain laws. Depending upon different employment laws, which may be applicable, whether the impact is per se prohibited, or whether the showing of discrimination requires specific intent, the statistics are not going to be inconsequential, and this may become important. The reduction may trigger WARN and state notice-forcing laws.

C. Certain individuals are protected because they have protected status. They may be disabled, or on protected leave which may extend beyond the reduction date, under the Family Medical Leave Act (or other state or local leave acts). That has to be taken into consideration.
D. Certain individuals may be prone to adverse impacts when there are terminations. If you know, or suspect, that an individual may be suicidal, or subject to medical problems, as an employer you may want to evaluate circumstances so that the individuals are not in a position to later maintain that they or others who have been adversely impacted should have been protected by some preplanning. This, however, raises disabilities issues and additional concerns too, since the decision to plan to avoid a perceived disability problem involves a “determination,” or even a “perception” of disability, which raises additional issues (such as possible discrimination or even defamation).

3. There are certain actions that can be taken that outline exactly every law and every consideration made above, and others that may be applicable, and still the reduction-in-force may inflict such trauma that employees may be prone to want to litigate. There are actions that can be taken that are proactive, and these include the following:

1. Outline the laws which could be involved. These include:
   
   (a) Labor laws—even in the absence of a union, “concerted activities” of employees relating to their wages, hours and working conditions may be protected.
   
   (b) Employment laws.
   
   (c) Safety laws.
   
   (d) Consumer laws including whistleblower laws.
   
   (e) Environmental workplace laws.
   
   (f) Benefit laws.
   
   (g) Retaliation laws.
   
   (h) Any other laws which may relate to an employer’s operation or cessation of operation.

2. In certain cases, there can be separation pay, and there can even be optional releases that provide additional separation pay in return for full releases, and also covenants to protect intellectual property. To the extent there are employees over the age of forty the ADEA release provisions (and OWBPA) become important.

3. In certain cases, the message as to why the reduction-in-force is occurring can be presented, and there can be offers of assistance. There may be entities which are available to provide services such as counseling and instruction on how to obtain new jobs, and
even assistance in connection with drafting resumes and letters of application. However, the information provided must be consistent with the employer’s policies and prior notices and communications.

D. In certain cases, employees involved may need some time to collect their thoughts, so the timing as to when the notice occurs and their ability to exit the workplace with dignity is very important. Individuals can be provided to assist so that employees can remove their belongings; and, arrangements can be made so if that employees are unable to do so for any reason, they have a right to return under conditions that have been planned with dignity. Sometimes where there is a fear that there may be violence in the workplace, or inappropriate actions, individuals can be hired who can protect against those types of problems and some of them (so that there are those who are available to provide the protection desired) can be designated to assist employees in moving, which means that it is less likely that the employees will feel that they were herded out by armed guards, or security, if the company provided some assistance in removal of items. See below for practical suggestions to minimize such issues and problems.

**Practical Points**

Practical considerations for implementing reductions-in-forces:

In addition to the points noted above, there are some very practical considerations to be evaluated, especially where there are efforts to achieve a reduction based upon decisions, which do not eliminate the total workforce, and involve selections. Listed in connection with the practical considerations that also will be discussed are the following:

1. Meet the top management. Determine the purpose, and the timing, and evaluate the total number of employees in whatever unit, or units, might be involved. Analyze whether the management will give you any flexibility. Occasionally rigid formulas, such as 20% reductions, are proposed as required, but they may not be as practical as obtaining some flexibility (and as the process proceeds, flexibility may occur due to appreciation of problems).

2. Evaluate the period over which this reduction process will occur, because:

A. Flexibility may work to your advantage if you can use small reductions (at staged periods), which may create better statistical information and may avoid the need to trigger notice requirements at the federal and state levels and, also, may enable you to reward those (in
some groups) who have had seniority with an additional period of work, in situations where you cannot make all of the decisions based upon the seniority.

B. Meet not only the top management, but the department heads, and, to the degree that you are permitted to do so (since sometimes the reductions in forces will involve members of management and supervisors) try to establish what you can with regard to:

(1) Evaluating the type of management and supervisors you work with, to determine whether you are going to be concerned about their decision making processes and to create increased participation and knowledge. Beware of the “cat’s paw” concept involving improper supervisors’ write-ups, which improperly prejudice later employment decisions.

(2) Evaluating the overall interrelationship of the different departments.

C. After you have engaged in a preliminary evaluation of some choices, evaluate each group or unit in relationship to all the other groups and units and employees. You may find that there are certain employees who, because of seniority or experience or skills (or both or all three), can be moved from one unit to another. If you are operating with a collective bargaining agreement, seniority may be either throughout the entire operation or, as it is often known, “plantwide,” or it may be based upon divisions, such as job classifications or locations. If you do not have a collective bargaining agreement, you can still use seniority and it has been used as a defense against civil rights claims. See, e.g., United States Airways, Inc. v. Barnett, 535 U.S. 391 (2002). Alternatively, if you decide that, based upon the overall profile, you want to follow seniority throughout a division to reduce forces and eliminate certain employees, you may then have to use seniority in other divisions, or you could use seniority throughout the plant, or workplace, if that will enable you to achieve the result you desire. If you properly analyze the profiles in advance, you may come up with consistent ways of justifying the decision making process which, because of your analysis, enable you to achieve the proper results you desire.

3. List all options. Sometimes you have absolutely no notice and have to make quick decisions within a few hours or days. Other times you have weeks, or even months, before you have to make a decision about how to have a reduction in force, and the options may change.

4. List all the plans, and run through a rehearsal of the strategy in terms of such considerations as:
A. The timing, and when these types of reductions will occur.

B. The procedure for informing first the top management and then the department heads and the supervisors and, finally, the employees. Determine whether the proposal of any reductions and the related process is “confidential” or already known to all.

C. Safety considerations: Sometimes you may find that the following types of issues occur:

   (1) Reductions in force may impact safety by virtue of reducing the number available to do certain chores, or duties. You may have to bring in extra security, which would not be within the working group, to provide certain protection when you shut down operations that normally are protected by employees who are working around the clock, or having operational areas populated. Occasionally, you may be able to bring in experts on shifts who are not in the units who can also perform some work on a temporary basis, and they can be involved in the relocation or dismantling of certain operations (but they may have the ability to continue to run an operation even after the employees have been laid off in a manner which is not inconsistent with the layoffs). If the reductions are general knowledge you may need incentives, or “stay pay,” to keep employees from leaving on their own.

   (2) Sometimes, as noted, you have to worry about the effect of the announcements on individuals. As examples:

      a. Certain individuals may be prone to react improperly. They may have medical conditions or they may need certain protection. You do not want to alarm people, but there may be circumstances where the health of someone would be so endangered that you would want to have an ambulance service available and located within a very short distance, so that if in retrospect the person had a problem, you would not be charged with being responsible for not having anticipated such a difficulty. This becomes a close call, because it can be intimidating if an ambulance is outside a building. The fact that you might have ordered an ambulance might be regarded as indicating that you thought you were doing some things which were improper or, as noted, perceiving a disability or problem in a manner which could create legal issues.

      b. Certain times individuals are regarded as unstable, and you may need to have extra security. Other times individuals are known to have hobbies, such as collecting guns, or they may have taken advantage of a law in a location which allows them to
have a gun at work, or in their car, or they may deal with weapons as part of their job. You may be concerned about security of others. You may need to have off-duty non-uniformed police officers available. This regarding an individual as unstable may also have ADA significance.

c. Certain people may be suicidal, and there may be information brought to your attention, when you are involved in such an evaluation process, that individuals have tried to kill themselves in the past. There may be a need to ensure that they safely enable themselves to reach their homes. Sometimes assistance can be set up to give people rides. Sometimes people can be discreetly monitored. Again, as noted, some of the decisions to be overly protective can create problems, including ADA problems.

d. Sometimes there are people who are just emotional, and it will be suggested later that you should have provided them with the appropriate notice and have certain additional managers who are able to deal with these people available to assist them.

e. Some employees as noted may want to find other jobs and that can create operational issues.

f. Some employees may be on protected Family Medical Leave Act leaves of absence.

5. Evaluate the types of problems that can occur. Illustrations are as follows:

A. Certain people can regard the process as insulting. You should evaluate the means by which you are going to advise people of the decision, and whether you are going to be singling out certain individuals in a way that may be regarded as an insult. You should plan the strategy for the notice, the presentation, and the location.

B. A classic illustration of the wrong way to terminate someone is to invite them into a conference room with windows, which is a fishbowl, or an office with windows which is a fishbowl, when you know that there may be an argument seen by others, and then have employees involved escorted by uniformed armed security through the offices or areas of others, so that it appears that while you had them in the room, there may have been some “false imprisonment,” while they were removed, and then if ID tags were “taken off of them” (as opposed to being verbally requested), there may have been an alleged “assault” and “battery,” and the process may be regarded as “defamatory” and “embarrassing,” and result in other types of problems.
6. Evaluate the ability of the management to function in a polite and appropriate form and format. This may involve:

A. Determining which members of management are appropriate for the communications.

B. Scripting individuals so that they know what they can say (and they can firmly and politely and comfortably repeat what they say so that they do not become involved in arguments, or statements that would be inappropriate).

C. Arrange to have people assisted so that if you want to move people out, you consider the time of day and whether others will be available, and whether (as noted) you can take advantage of non-uniformed off-duty police officers, or a security detail, to have them serve as helping assistants so that they use cartons and other materials (made available in advance to help people actually move out of the location).

D. Consider systems where you may use recruiting and other types of outplacing and HR firms which set up systems for assisting employees who have been terminated, by arranging to meet with them, lecture them on the process (so they do not regard it as the end of a job but rather a situation where they will now move forward with their lives) and enable those involved to attend meetings at another location where perhaps the outsourcing agency or outside agency may have facilities. If these types of organizations exist and are available, they may also have assistants to help employees create bios and resumes and apply for other jobs.

E. Introduce structure, so that when you are in the process of eliminate people’s jobs, you assist them with explanations, so that they can not only deal with their families and friends and others they communicate with, but know how to move on and to present themselves so that they feel they have something to look forward to and a positive approach. This can also be combined with situations where you have the funds to set up assistance.

F. Evaluate what you need from the employees and how you are going to manage matters, so that if you have confidential materials or you have systems that are vulnerable, you have ways of removing the individuals from the workplace and explaining to them that their systems will be shut down, and they will be given certain limited access.

G. Evaluate what you need from the employees, so that you can set up a system to provide them with an opportunity to turn in passes and equipment, and also an
opportunity to return at a later time when they are not involved in a working day to return materials or have materials collected.

H. Ensure that if you have incentives, or “stay pay,” and want to use releases you are able to be consistent, or can justify “inconsistencies,” or distinguish differences.


IV. Conclusion

It is appropriate to evaluate the process and many of the appropriate procedures are generally utilized by those who have had repetitive reductions in forces, or agencies, or counsel who have had experience in this type of a process, and, also, time and finances to do such a review. There are some outside independent entities which have independent HR staffs and psychologists and psychiatrists (and can provide this type of consulting service and will actually come in and assist you with the process and then move people to their offices where they can provide additional assistance over a period of time, subject to contracts that you can enter into to provide such services). You can also read the case law, and see the type of situations where people who have not been treated properly sue, because of the emotional distress or other theories, such as defamation and other torts, in addition to regular labor and employment laws. There is no “book” on a single process to use since each situation involves unique facts and, you must remember at all times, you are dealing with human reactions among different individuals. Think not only of “employees” but of “individuals” and their emotions and concerns and aspirations.

The more time you can put into evaluating the appropriate way to have a reduction in force, the less time and costs you may have to put in in terms of the litigation experiences (and the fees, and the expenses). Key ideas justifying your decisions may reduce claims due to reduction of hostility and assist due to case law. The U.S. Supreme Court, in trying to resolve complex competing considerations, has used a “but for” (two words) test for ADEA discrimination cases as to intent. In Gross v. FBL Financial Services, 129 S. Ct. 2343, at 2349
n.2 (2009), the U.S. Supreme Court held ADEA plaintiffs must prove by a preponderance of the evidence that age was the "but for" cause of the challenged employer decision. The Court rejected a "mixed motive" theory. The U.S. Supreme Court also ruled in Smith v. City of Jackson, Mississippi, 544 U.S. 228 (2005) that the plaintiff is "responsible for isolating and identifying the specific employment practice that is allegedly responsible for any observed statistical disparities." See also Appendix A for an article listing such U.S. Supreme Court decisions, which may create additional defenses.

Often time is not available and many of these points simply cannot be utilized. They are not presented as legal standards or requirements but, rather, as considerations, which may assist as possible guidance. As noted, these points may be of assistance even where there are not employees protected by ADEA. But in most cases ADEA considerations are involved. And the more diverse the workforce the more important such considerations may be. In addition, in most reductions in forces, many of the people who leave, even if you do not desire them as future employees may still retain goodwill, if you use the proper process (which could be an added benefit of treating people in the appropriate way, so that they appreciate what you have done). That may help you in the community and in many other ways (depending upon your location and probability and other opportunities) that, in addition to avoiding the legal problems, may make this type of attention to detail and planning a worthwhile effort.