Bureau of Labor Statistics

- Unemployment rate 5.0% in December 2007
- Up from 4.4% in December 2006
- Mass Layoff* Events in the US
  - 2005: 16,466
  - 2006: 13,998
  - 2007: 13,326 (through November 2007)

*Mass layoff is defined by BLS as an event in which there are 50 initial claims for unemployment insurance filed against employer during a 5-week period.
Potential Reasons for Layoffs

- Business Demand
  - contract cancellation/completion
  - Insufficient demand
- Organizational Changes
  - New ownership
  - Restructuring/reorganization
- Financial Issues
  - Bankruptcy
  - Cost control/cost cutting/increase profitability
  - Financial difficulties
- External Crisis
  - Product recall
  - Weather/Natural disaster
  - Hazardous work environment
- Seasonal Industry

Considerations Before Undertaking a RIF

- Assessing the business need for terminating a large number of employees
- Alternatives to cutting non-personnel costs: (supplies, corporate travel, advertising and corporate sponsorships, suspending new initiatives)
- Alternatives to cutting personnel costs:
  - Compensation cuts or freezes
  - Reducing PTO and other benefits
  - Prohibiting overtime
  - Temporary shutdowns
  - Hiring freezes
  - Voluntary exit incentive programs
  - Voluntary retirement programs
- Public relations (internal and external)
- Employee morale
- Impact on productivity
RIF Considerations

- What is the goal – reduce headcount or salary costs?
- What selection criteria will be used?
- What process will be followed?
- Assessing legal exposure
- What benefits should be provided?
- How should the decision be communicated to employees, the media, the public?

RIF Decision-Making

How many employees will be terminated?
- Do you want to do it all at once, or in stages?
- Do you want to plan one RIF conservatively, and then proceed to undertake another RIF, if still necessary?

First, determine the criteria, then apply them.
1. Define goals of the RIF
2. Articulate the criteria
3. Determine relative weight of multiple criteria
4. Identify and assign various levels of decision-makers
Discrimination Issues

- RIF decisions cannot be based on any protected characteristic.
  - Under federal law, protected characteristics include race, color, religion, sex, national origin, age (over 40), pregnancy, union activities, disability, FMLA leave status, military status.
  - Under state and local laws, protected characteristics also include sexual orientation, marital/familial status, arrest/conviction record, and predisposing genetic traits, among other characteristics.

Types of RIF Discrimination Claims

- Disparate Treatment—Direct Evidence ("Smoking Gun")
- Disparate Treatment—Indirect Evidence ("Pretext")
- Disparate Impact
- Pattern or Practice
Disparate Treatment – Direct Evidence

- Direct evidence proves discrimination without the need for inference or interpretation.

- Statements by a person involved in the decision making process that reflect a discriminatory animus may constitute direct evidence.

Disparate Treatment – Indirect Evidence

- Applies three-part burden shifting model of proof under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

- Step One—the Prima Facie Case:
  - Plaintiff is a member of a protected class
  - Plaintiff was qualified to assume another available position
  - Plaintiff was discharged
  - Discharge occurred under circumstances giving rise to an inference of discrimination:
    - e.g., where a similarly situated person of lesser qualifications outside of the protected class was retained
    - In age discrimination context, comparator need not be under age 40 but must be “substantially younger” than the plaintiff
Disparate Treatment – Indirect Evidence

- Step Two—employer must articulate a legitimate non-discriminatory reason for the RIF:
  - reorganization/restructuring
  - business climate
  - financial considerations
  - cost cutting
  - performance reviews
  - sales/productivity
  - need for particular skills/abilities
- Step Three—Plaintiff has the opportunity to prove that the employer’s stated reasons for the RIF decision was not the true reason for its actions but a mere pretext for unlawful discrimination.

Disparate Impact

- Under a disparate impact theory, plaintiffs can prove discrimination by showing that an employer’s facially neutral RIF policies or procedures had an adverse impact upon a protected class.
Disparate Impact

- Statistical evidence is used to support disparate impact claims.
- Methods of measuring disparate impact—
  - “Four-fifths rule”—federal enforcement agencies generally find disparate impact if protected class members are selected at a rate more than four-fifths (80%) of the rate for the group with the highest selection. 29 CFR 1607.4(D).
  - “Standard deviation” analysis—statistically measures the difference between the actual numbers of the protected group in a sample and the numbers of the protected group that would be expected in a perfectly proportional process of selection from the appropriate labor pool. Courts generally find an adverse impact if the difference between the number of members of the protected class selected and the number that would be anticipated in a random selection system is more than two or three standard deviations. Hazelwood School District v. United States, 433 U.S. 299, 308-09 n.14 (1977).

Disparate Impact

- If a plaintiff can show a disparate impact, the employer must demonstrate that the challenged practice is "job-related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).
- The plaintiff then has an opportunity to show that that there is an available alternative employment practice that would satisfy the employer's legitimate interests without having a disparate impact on a protected class. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).
Disparate Impact - ADEA

- ADEA plaintiff must identify a specific test, requirement, or practice that had a disparate impact on older workers. A generalized policy or practice will not suffice. *Id. at* 231.
- The ADEA allows employers to take an employment action "where the differentiation is based on reasonable factors other than age." Thus, unlike Title VII cases, there is no obligation under ADEA to look to whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class. *Id. at* 243.

Pattern and Practice

- Unlike disparate impact claim, pattern and practice claims require proof of intentional discrimination.
- Plaintiffs must prove that discrimination was the employer’s "standard operating procedure, i.e., the regular rather than the unusual practice." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).
- To establish a prima facie case of a pattern and practice of discrimination, a plaintiff ordinarily must offer reliable statistical evidence, buttressed by evidence of general policies and specific instances of discrimination.
- If this burden is met, the employer has the burden of production to show that the challenged decisions were made for legitimate, nondiscriminatory reasons, or that the plaintiff’s proof is inaccurate or insignificant.
Selection Criteria

- Should be consistent with the business reasons for the RIF
- Should make sense from a business perspective
- To the extent practicable, should be uniformly applied
- Decision makers must understand and be able to articulate the selection criteria
- Objective criteria should be used to the extent possible, although employers are generally permitted to use subjective criteria

Objective vs. Subjective Criteria

- Objective
  - Performance ratings
  - Job functions
  - Seniority
  - Education/certifications
  - Attendance records/disciplinary records
  - Past merit bonuses
  - Any objective measurements of productivity
- Subjective
  - Performance assessment
  - Performance potential (in current job and others)
  - Leadership
  - Communication skills
Selection Process

1. Preliminary selection decisions made
2. Review of preliminary decisions by second level of decision makers; fine-tune decisions
3. Review of supporting documentation for the decisions – additional fine-tuning
4. Overall review by management

Selection Process (continued)

5. Overall review by Human Resources
   - Review of supporting documentation
   - Disparate impact analysis:
     - Consider both the 4/5 rule and standard deviation analysis
     - Avoid a one-size fits all approach to disparate impact analysis
     - Analyze and categorize the data at the level where the decisions are actually made (e.g., by business unit, job classification), so that similarly situated employees can be identified and compared
     - Control for the variables that will actually affect the decision-making (e.g., performance evaluations)
   - Challenge comparative rankings – require initial decision-makers to state specifically why someone is listed, and their peers are not
Documentation

- Ensure that documentation supports decisions to:
  - Undertake the RIF
  - Select particular employees
  - Contains no smoking guns (e.g. age distribution of affected employees)
  - Maintain the privileged status of documents
The Unemployment Rate and Reductions in Force Have Begun to Rise

<table>
<thead>
<tr>
<th>Year</th>
<th>Unemployment Rate</th>
<th>Number on Layoff</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>2.5</td>
<td>250</td>
</tr>
<tr>
<td>1998</td>
<td>3.6</td>
<td>400</td>
</tr>
<tr>
<td>1999</td>
<td>4.7</td>
<td>500</td>
</tr>
<tr>
<td>2000</td>
<td>5.8</td>
<td>650</td>
</tr>
<tr>
<td>2001</td>
<td>6.9</td>
<td>800</td>
</tr>
<tr>
<td>2002</td>
<td>8.0</td>
<td>950</td>
</tr>
<tr>
<td>2003</td>
<td>9.1</td>
<td>1100</td>
</tr>
<tr>
<td>2004</td>
<td>10.2</td>
<td>1250</td>
</tr>
<tr>
<td>2005</td>
<td>11.3</td>
<td>1400</td>
</tr>
<tr>
<td>2006</td>
<td>12.4</td>
<td>1550</td>
</tr>
<tr>
<td>2007</td>
<td>13.5</td>
<td>1700</td>
</tr>
</tbody>
</table>

Source: U.S. Department of Labor, Bureau of Labor Statistics
http://www.bls.gov/

The Role of Labor Economists/Statisticians in RIFs

Proactive Adverse Impact Analysis to Reduce Legal Exposure
- Assistance in evaluating the impact of workforce reduction plans
- Accurate model of the decision making-process
- Specific advice for revising workforce reduction plans
- Enhanced documentation to reduce the risk of litigation

Litigation Support
- Analytic support in class certification, liability, and damages phases
- Assistance with discovery and data management
- Assistance in the development of legal strategies consistent with preliminary findings
- Assessment of alternative statistical approaches and sampling
- Expert testimony and critiques of opposing experts
Proactive Adverse Impact Studies

- To minimize legal exposure, it is important for employers to understand how workforce reductions affect protected groups before lay-off decisions are final
- Proactive disparate impact analysis methodology includes:
  - Effectively modeling how reductions affect protected groups
  - Conducting a statistical assessment of adverse impact arising from proposed workforce reductions
  - Providing informative reports which point out areas where proposals are vulnerable
  - Investigating rationale for selections
  - Offering alternative plans and/or modifications of existing plans which limit adverse impact

Reasoning Behind Tests for Adverse Impact

The distribution of older employees (and other protected class members) selected is expected to match the overall distribution in a completely random selection process.
Basic Statistical Approach

1. Identify the pool of employees from which the RIF is to be made

2. Measure the representation or proportion (p) of older employees (Age 40+) in the pool

3. Identify the number of positions eliminated or employees terminated (q)

4. Calculate the expected number of older terminations as (p X q)

5. Compare the expected number to the actual number of older terminations

6. If the actual number of selected older employees is greater than their expected number, assess the statistical significance of the difference

A Numerical Example – XYZ Company Wide

<table>
<thead>
<tr>
<th></th>
<th>Under 40</th>
<th>Over 40</th>
</tr>
</thead>
<tbody>
<tr>
<td>Selections</td>
<td>180</td>
<td>120</td>
</tr>
<tr>
<td>Percent</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>Total</td>
<td>300</td>
<td>300</td>
</tr>
<tr>
<td>Expected</td>
<td>39.6</td>
<td>26.4</td>
</tr>
<tr>
<td>Actual</td>
<td>31</td>
<td>35</td>
</tr>
<tr>
<td>Difference</td>
<td>- 8.6</td>
<td>8.6</td>
</tr>
<tr>
<td>Chi-Square</td>
<td>5.99</td>
<td></td>
</tr>
<tr>
<td>Coefficient</td>
<td></td>
<td></td>
</tr>
<tr>
<td>P-value</td>
<td>0.014</td>
<td></td>
</tr>
</tbody>
</table>

Overrepresentation of older workers? Yes
Statistically significant overrepresentation? Yes
Complications: Inappropriate Aggregation Can Yield Spurious Statistical Associations

If:
- One group of employees has a higher risk of termination than another group due to factors such as job function or geographic location

And:
- The group that is more at risk happens to be older

Then:
- A statistical test of adverse impact for the employees pooled together into one aggregate analysis (as in the previous example) could yield false evidence of adverse impact

A Numerical Example – XYZ by Division (1 of 2)

Adverse Impact Analysis of Graphics Division of XYZ Inc.
Reduction in Force of 47 out of 150 Employees

<table>
<thead>
<tr>
<th>Selections</th>
<th>Chi-Square Coefficient</th>
<th>P-value</th>
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</thead>
<tbody>
<tr>
<td>Total</td>
<td>Percent</td>
<td>Expected</td>
</tr>
<tr>
<td>Under 40</td>
<td>55</td>
<td>37%</td>
</tr>
<tr>
<td>Over 40</td>
<td>95</td>
<td>63%</td>
</tr>
<tr>
<td></td>
<td>150</td>
<td></td>
</tr>
</tbody>
</table>

Overrepresentation of older workers? No
No statistical test required
### A Numerical Example – XYZ by Division (2 of 2)

#### Adverse Impact Analysis of Cable Division of XYZ Inc.
Reduction in Force of 19 out of 150 Employees

<table>
<thead>
<tr>
<th>Selections</th>
<th>Total</th>
<th>Percent</th>
<th>Expected</th>
<th>Actual</th>
<th>Difference</th>
<th>Chi-Square</th>
<th>Coefficient</th>
<th>P-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 40</td>
<td>125</td>
<td>83%</td>
<td>15.8</td>
<td>13</td>
<td>-2.8</td>
<td>3.483</td>
<td></td>
<td>0.062</td>
</tr>
<tr>
<td>Over 40</td>
<td>25</td>
<td>17%</td>
<td>3.2</td>
<td>6</td>
<td>2.8</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>150</td>
<td></td>
<td>19</td>
<td>19</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Overrepresentation of older workers? Yes
Statistically significant overrepresentation? No

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### When Are Disparities Statistically Significant?

In social science research, the .05 (five percent) level is conventionally used as a benchmark level:

- The .05 level is approximately equal to two standard deviations.
- Odds Ratios associated with this benchmark level of statistical significance have small likelihood (one in 20) of being attributable to chance and are thus presumed to be related to age (or the relevant protected class).

More conservative benchmark level, .10 (ten percent)

- The .10 level is equal to 1.65 standard deviations.
When Are Disparities Statistically Significant?

Chi-Square Distribution

Statistical Tests Used in Adverse Impact Analysis

Bivariate Techniques

- **Chi-Square Test**: Compares the actual number of older workers selected in a RIF to their expected number. Typically used when the number of total employees is “large.”

- **Fisher’s Exact Test**: Preferred alternative to Chi-Square test when sample size is small or the sample is unbalanced.

- **T-test**: Compares the average age of *stayers* and *leavers*, to test if the planned workforce reduction lowers the average age of the workforce.

Multivariate Technique

- **Logistic Regression**: Controls for factors – other than age – considered in decision making in testing the relationship between RIF selection and age.
Model the Decision Process Carefully to Capture All Legitimate Factors Considered in Selection

Factors frequently used in determining workforce reductions that may serve as statistical “controls”:

- Job categories
- Geographic location
- Organizational unit
- Performance ratings
- Educational attainment
- Seniority
- Past commendations

Controlling for Legitimate Selection Criteria

Logistic Regression – Incorrectly Specified

Actual Selection Criteria:
1. Job function
2. Performance rating

Incorrectly Specified Model:

\[
\text{Probability of Termination} = \text{function (Age40+, Job function)}
\]

Controlling for job function only:

- Odds Ratio on Age: 3.5
- Probability Value: 0.01
- Statistically Significant? Yes

- The odds ratio is the ratio of the odds of termination of an employee 40 or older relative to the odds of an employee under 40.
- The probability value of 0.01 (lower than 0.05) indicates statistical significance of overrepresentation of older workers in the pool of laid-off workers.
Controlling for Legitimate Selection Criteria (cont.)

Logistic Regression – Correctly Specified

Correctly Specified Model: Captures All Factors used in RIF Selection Criteria:

Probability of Termination = function (Age40+, Job function, Performance Rating)

Controlling for job function and performance rating:

- Odds Ratio on Age: 1.84
- Probability Value: 0.56
- Statistically significant? No

- The odds ratio is the ratio of the odds of termination of an employee 40 or older relative to the odds of an employee under 40.
- The probability value of 0.56 (greater than 0.05) does not indicate statistical significance of overrepresentation of older workers in the pool of laid-off workers.

Complications: Statistical Significance Does Not Necessarily Imply Practical Significance

80% Rule

- Inappropriate for small sample sizes
- May be misleading where selection rates are low
- Sensitive to use of selection vs. rejection rates

Phi Coefficient

- Transformation of the Chi-Square statistic
- Free of problems plaguing 80% Rule

Count of the number of “surplus” terminations

- Difference between expected number of older terminations and actual number of older terminations
- Calculation of the required number of “saves” to eliminate statistical significance
Extensions: Assessment of Other Age Groups May Be Informative

ADEA protected class is employees age 40+

Assessments of potential adverse impact on employees age 50+ and 55+ may be informative

- Frequently presented by plaintiff experts in litigation
- Courts often are willing to consider such analyses
- Assessments help to focus an investigation of causes of adverse impact
- May help in identifying potential ERISA violation claims

Adverse impact analysis should consider other protected classes:

- Gender
- Race/ethnicity


A 2003 study examined statistical relationship between RIF personnel practices and litigation outcomes.¹

- Analyzed 115 federal district court cases decided in the 5-year period between October 1, 1993, and October 1, 1998.
- All cases involved age discrimination disparate treatment allegations in organizational downsizing.
- Summary judgment was granted for the defendant in 73% of cases and denied in 27% of the cases.

Statistical Evidence on the Influence of Personnel Practices on Litigation Outcomes – Study Results

Factors Associated with Decision in Favor of Defendant:

Organizational Personnel Practices
- Existence of a written layoff policy (odds ratio: 0.15, p-value: 0.004)
- Review of the termination decision by someone within the defendant organization other than the immediate supervisor (odds ratio: 0.27, p-value: 0.025)

Characteristics of the Plaintiffs
- Documentation by the organization of substandard plaintiff performance. (odds ratio: 0.19, p-value: 0.001)
- Defendant organizations that assessed the plaintiffs’ capability to perform in different positions and jobs prior to termination. (odds ratio: 6.67, p-value: 0.000)

Maintaining Privileged Status Of Pre-RIF Analyses
- Potentially Available Privileges:
  - Work product doctrine
  - Attorney-client privilege
  - Self-critical analysis privilege
Strategies to Maintain the Privileges

- Employer should prepare a written request for legal advice regarding RIF planning and implementation.
- Documents prepared by counsel (particularly any final report or summary) should explicitly refer to that request for legal advice.
- Counsel should set forth in detail all of the potential litigation that is anticipated and why he or she believes such litigation is likely.
- Counsel should coordinate and supervise the process of RIF planning and implementation.
- Statisticians and consultants should be retained by counsel and report directly to counsel.
- The formal retention letter for any statistician or consultant should set forth the elements of the applicable privileges and indicate that the individual’s assistance is necessary for the purpose of rendering legal advice to the company.

Strategies to Maintain the Privileges (cont’d)

- All correspondence and documents for which a privilege will be claimed should be created with the expectation that they will be considered confidential, and they should be treated as confidential at all times.
- Access to discussions, correspondence, and documents should be restricted to only those individuals who need to have information or be involved, and this restricted access should be documented.
- Reports, notes, communications, and other documents (in written and electronic format) should be labeled “privileged and confidential” and “attorney work product.”
- To avoid the risk of waiving a privilege, the company should take measures to assure that no privileged material is voluntarily or inadvertently disclosed to a third party.
- In the event of litigation, a statistician or other consultant who had been involved in RIF planning should not be retained as a testifying expert.
WARN Act

- The federal Worker Adjustment and Retraining Notification Act (WARN) requires employers to give employees at least 60 days advance notice (or alternatively, 60 days pay in lieu of notice) in the event of a covered “plant closing” or “mass layoff.”
- Applies to employers with 100 or more employees (excluding employees who have worked less than 6 months in the last 12 months and not counting employees who work an average of less than 20 hours a week)
  - “Plant Closing”—shutdown of an employment site or facility that results in an employment loss for 50 or more employees during any 30-day period.
  - “Mass Layoff”—loss of employment during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer’s active workforce.
- Additional notice/payment requirement: Job losses within any 90-day period will count toward WARN threshold levels, unless the employer demonstrates that the job losses are the result of separate and distinct actions and causes.

WARN Act (continued)

EXCEPTIONS TO 60-DAY NOTICE REQUIREMENT

- **Faltering company**: 60-days advance notice is not required if, prior to a plant closing, an employer is actively seeking capital or business that would allow the employer to avoid a shutdown, provided that the employer reasonably and in good faith believes that advance notice would prevent the employer from obtaining such capital or business.
- **Unforeseen business circumstances exception**: 60 days advance is notice not required in the event of a sudden, dramatic, and unexpected action or condition outside the employer’s control that was not reasonably foreseeable. It is the employer’s burden to show that the event causing the employment loss was truly unforeseeable to a reasonable employer.
- **Natural disaster**: When a plant closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, drought, storm, tidal wave, or similar effects of nature, notice may be given after the event.

For all of these exceptions, the employer must give as much notice as possible under the circumstances.
WARN Act (continued)

Who Must Receive Notice:

- The exclusive collective bargaining representative of affected employees
- Unrepresented individual workers who may reasonably be expected to experience an employment loss
- The State dislocated worker unit
- The chief elected official of the unit of local government in which the employment site is located (e.g., the mayor of the town/city where the layoffs will occur)

State WARN Acts

- A number of states and localities have enacted their own WARN statutes:
  - California, Connecticut, Hawaii, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, Oregon, Rhode Island, South Carolina, Tennessee, Virgin Islands, Wisconsin
  - Some states’ laws do nothing more than track federal requirements. Others may:
    - Extend coverage to employers not covered by WARN
    - Lengthen the notice period
    - Remove exemptions available under federal law
    - Impose additional penalties for non-compliance
State WARN Acts (continued)

- Example: New Jersey (enacted December 20, 2007):
  - Coverage and notice requirements similar to federal law
  - No faltering company or unforeseen business circumstances exemptions
  - Natural disaster exemption applies only to a termination of operations (not to mass layoffs or a transfer of operations)
  - Employer who does not give required 60-days notice must pay its employees, in addition to 60-days notice pay, severance equal to one week of pay for each full year of employment.
- Employers should be mindful of additional state laws that impose additional notice obligations on employers upon termination.
- Example: New York law requires employers to provide the following two notices to employees on or shortly following termination:
  - Notice of Termination. Employers must give written notice to employees within five working days of their termination of (i) the exact date of termination and (ii) the exact date of cancellation of employee benefits connected with the termination, such as health and life insurance. NY Lab. L. § 195.6
  - Notice of right to file a claim for unemployment insurance. See NY Lab. L. § 575.1 & 12 NYCCR § 472.8.

Packages and Benefits

- Severance Benefits
- Health Care Continuation (COBRA)
- Unemployment Compensation
- Outplacement

- Review handbooks, collective bargaining agreements, and employment contracts for existing obligations
Considerations For Obtaining Releases

- Employers conducting a RIF and seeking to avoid litigation may wish to provide severance pay to terminated employees in exchange for their signing a release agreement not to sue their employer.
- Release agreements must be knowing and voluntary.
- Release agreements must provide employees pay and/or benefits to which they would not otherwise be entitled absent a release:
  - Payment in lieu of WARN notice requirements insufficient
  - Severance benefits payable under employer’s policy or employment contract are insufficient
  - COBRA continuation coverage also not sufficient (unless employee’s share is subsidized by the employer)
- Statutory discrimination claims arising after the date of execution of the release agreement generally cannot be released.
- Release agreements cannot promise non-cooperation or non-participation in government enforcement proceedings (but generally can waive the employee’s right to recover money damages arising out of any such proceeding).
- Releases of claims under the ADEA must conform to the Older Worker Benefit Protection Act.

Releasing ADEA Claims

- Requirements of Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)
  - An individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary.
  - ... a waiver may not be considered knowing and voluntary unless at a minimum
    - (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
    - (B) the waiver specifically refers to rights or claims arising under this chapter;
    - (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
    - (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
Requirements of the OWBPA (continued)

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;
(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

Requirements of the OWBPA (continued)

- If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees,
- the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to-
  - (i) 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
  - (ii) 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.
Information Requirements For Release Agreements Under The ADEA

- The “class, unit, or group of individuals” covered by an exit incentive or other employment termination program is determined by examining the “decisional unit.” 29 CFR § 1625.22(f)(1)(iii)(C).
- A “decisional unit” is “that portion of the employer’s organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver.” 29 CFR § 1625.22(f)(3)(i)(B).

Employees On Leave During A RIF

Family and Medical Leave Act (FMLA)
- The FMLA generally requires covered employer to give employees up to 12 weeks of leave for a qualifying family or medical reason, and generally entitles an employee to be reinstated to the same or equivalent position at the conclusion of the leave. 29 USC §§ 2612, 2614.
- An employee on FMLA leave is not protected from discharge if the employee would have been laid off if he or she had remained at work, provided that the employer has no continuing obligations under a collective bargaining agreement or otherwise. 29 CFR §825.216 (a)(1).
- The employer’s obligation to maintain group health plan benefits likewise cease at the time the employee is laid off. 29 CFR §825.216 (a)(1).
- Caution: the FMLA prohibits discrimination against employees who have used FMLA leave. 29 USC §§ 2615. Therefore, an employee’s status on FMLA leave cannot be a consideration in deciding whether to select that employee for layoff.
Employees On Leave During A RIF

Uniformed Services Employment and Reemployment Rights Act (USERRA)

- USERRA prohibits employment discrimination based on military service. 38 U.S.C. §4311
- USERRA also requires employers to reinstate employees returning from military service to the job that they would have attained had they not been serving in the military with the same seniority, status, pay and other benefits.
- An employer is not required to reinstate a returning service member where the employer can show that its circumstances have so changed as to make reemployment impossible or unreasonable, or that reemployment would impose an undue hardship on the employer. 38 U.S.C. §4312.
  - This exception has been held to apply if the employer proves that the returning service member’s job was eliminated in a RIF. See Cole v. Swint, 961 F. 2d 58 (5th Cir. 1992); Anthony v. Basic Am. Foods, Inc., 600 F. Supp. 352 (N.D. Cal. 1984)

Communications to Affected Employees

- The primary purpose is to inform the employee that he or she has been affected by the RIF
- Avoid ambiguity about the employee’s status
- At all times treat employee with dignity and respect
- Avoid discussions about the business reasons for the RIF, or how the criteria applied to the affected employee
- Prepare talking points for the manager who will be notifying the affected employee
- Have a third person in the room during the meeting (HR or other manager)
- Prepare an information packet for the employee, including:
  - the proposed release agreement, if applicable
  - any applicable severance plans or policies
  - COBRA and other benefits information
  - information regarding outplacement assistance
Communications to Retained Employees

- Morale/productivity concerns
- Maintain open door policy, but avoid discussion of reasons specific employees were selected
- Be prepared to respond to questions about the potential for future reductions in force
- Employee assistance program

Post-RIF Aftermath

- Subsequent hiring decisions
- Re-hiring of employees who were separated in reduction in force
DISPARATE TREATMENT – EXAMPLES OF COURT FINDINGS OF DIRECT EVIDENCE IN RIF CONTEXT

- DiCarlo v. Potter, 358 F.3d 408 (6th Cir. 2004) (supervisor referring to an older employee as “no spring chicken” and stating that he would not advance in the company because of his age)

- Frank v. Xerox Corp., 347 F.3d 130 (5th Cir. 2003) (policy of reducing percentages of employees by race under a balanced work force initiative to ensure that all racial and gender groups were proportionately represented at all levels of the company)

- Fakete v. Aetna, Inc., 308 F.3d 335, 336 (3d Cir. 2002) (supervisor’s statement that he was “looking for younger single people”)

- Rose v. N.Y. City Bd. of Educ., 257 F.3d 156 (2d Cir. 2001) (supervisor’s statement that he was looking to replace employee with someone "younger and cheaper")

- Gonnerman v. McHan Construction, Inc., __ F. Supp. 2d __, 2007 WL 3121659 * 1 (N.D. Iowa 2007) (supervisor's statement that employee was "too old to do [his] work … and complained too much")
Meacham v. Knolls Atomic Power Lab., 461 F.3d 134 (2d Cir. 2006):

- On remand from the United States Supreme Court in light of Smith v. City of Jackson, the United States Court of Appeals for the Second Circuit held that the employer was entitled to judgment as a matter of law and dismissal of the plaintiffs’ disparate impact claims under the ADEA.

- In the employer’s RIF, 30 of the 31 employees separated were over the age of 40.

- The employer’s stated business justification was to reduce its workforce while still retaining employees with skills critical to the performance of the employer’s functions. In light of Smith, plaintiffs’ claims could survive dismissal only if the plaintiffs demonstrated that the employer’s methods of achieving this business justification were unreasonable.

- The Court held that “[t]here may have been other reasonable ways for [the employer] to achieve its goals,” but “the one selected was not unreasonable.” Meacham, 461 F.3d at 146.

Pippin v. Burlington Resources Oil and Gas Co., 440 F.3d 1196 (10th Cir. 2006):

- The United States Court of Appeals for the Tenth Circuit held that the trial court properly granted summary judgment in favor of an employer and against a 51-year-old employee who alleged the employer illegally discriminated due to age.

- The employer alleged it fired the employee as part of an RIF and corporate restructuring in which the employer let go of its employees with the lowest past performance reports.

- The court found that the employee failed to show specific statistics on the number of over 40 employees laid off versus the number of under 40 employees laid off. Additionally, the employee was unable to show that the policy of dismissing the employees with the lowest past performance reports was unreasonable.

- The Court observed that the Supreme Court pointed out in Smith v. City of Jackson that the ADEA “significantly narrows its coverage by permitting any ‘otherwise prohibited’ action ‘where the differentiation is based on reasonable factors other than age.”’ 440 F.3d at 1200. Thus, an employer’s potential liability for disparate impact under ADEA was significantly limited.
The court granted partial summary judgment in favor of the EEOC in a representative action under the ADEA on behalf of a group of former employees who were terminated in a RIF. The EEOC alleged that the employer’s policy of not allowing them to seek other positions within the company after it reorganized was unlawful.

The court found that the EEOC had demonstrated a *prima facie* case of disparate treatment discrimination as a matter of law, where 90 percent of the employees who would have been barred from being rehired were over 40, and that employees over 40 were impacted over 10 times the rate by which employees under 40 were impacted by the rehiring policy.

The court turned to the “reasonableness inquiry” mandated by the Supreme Court in *Smith*. The court held that a plaintiff could prevail on a disparate impact case under the ADEA if it could prove that the factors other than age considered by the employer were unreasonable. 458 F. Supp. 2d at 988. The employer’s business justification for the no-rehire policy was to 1) avoid customer confusion when seeing former insurance agents working in different jobs within the company, 2) encourage former employee-agents to participate in the independent contractor program, and 3) avoid double-dipping of employees receiving both salaries and severance benefits.

The court found there were issues of fact as to whether the policymakers reasonably considered the rationales before setting the policy. Therefore, the court declined to dispose of the “reasonableness” inquiry on summary judgment.
MAINTAINING THE PRIVILEGED STATUS OF PRE-RIF ANALYSES

The work product doctrine, attorney-client privilege, and self-critical analysis privilege should be considered to prevent disclosure of documents and analysis associated with the RIF and evaluation of potential disparate impact of the RIF. This is an area in which employers should proceed with caution because the immunity and privileges at issue involve a fact-specific inquiry, and the courts have not consistently protected materials associated with RIFs.

I. Work Product Doctrine

A. Overview

The work product doctrine provides a basis for preventing disclosure of thoughts and materials prepared in anticipation of litigation. Its purpose is to protect attorneys’ mental processes so that they can analyze and prepare a case without interference. See Moore’s Federal Practice 3d, § 26.70[8]. The doctrine, originally articulated by the Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947), is codified in Federal Rule of Civil Procedure 26(b)(3). Subsection A of the rule, entitled “Documents and Tangible Things,” provides the following:

Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and
(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.


Because this doctrine protects documents prepared by or for the party or its counsel, it can be invoked to prevent disclosure of studies performed at the direction of the party’s attorney. Martin v. Monfort, Inc., 150 F.R.D. 172 (D. Colo. 1993) (FLSA case in which court did not require party to produce time and motion studies performed at the direction of counsel). It is worth noting, however, that the overwhelming majority of courts hold that a party must disclose all work product, including even an attorney’s opinion work product, if that material had been shared
with an expert who will testify at trial. *Regional Airport Auth. v. LFG, LLC*, 460 F.3d 697, 717 (6th Cir. 2006).

The main barrier to successful assertion of the work product doctrine is the requirement that the documents have been prepared in anticipation of litigation. *See Moore’s Federal Practice 3d*, § 26.70[3][c]. In evaluating this element, courts will consider whether “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *Martin v. Bally’s Park Place Hotel and Casino*, 983 F.2d 1252, 1258 (3d Cir. 1993) (citing *In Re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979) and 8 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2024 at 198 (1970)). As long as the document was prepared in anticipation of litigation, it is not necessary that the particular suit was foreseen at time of preparation. *Id.* at 1261.¹

### B. Employment Discrimination Cases

*Evans v. Atwood*, 177 F.R.D. 1 (D.D.C. 1997), involved former federal employees claiming age discrimination and seeking documents from a RIF at the U.S. Agency for International Development. The court explained that the concept “in anticipation of litigation” has both a temporal and a motivational dimension, thus a protected document must have been created before or during litigation and must have been prepared for litigation and not for some other purpose. The court held that none of the documents at issue in this case were protected by the work product doctrine. Two of the documents dealt with staffing levels and were created for the purpose of obtaining permission to hire more employees and explaining detrimental effects of further reducing employees, not for the purpose of preparing for litigation. A third document advised employees that plaintiffs had filed this lawsuit and provided guidance for responding to inquiries. Even though the litigation was the reason for creating the document, the court found that this type of internal guidance, which was only somewhat connected to litigation itself, was outside the scope of the work product doctrine.

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¹ Some commentators suggest using outside professionals, instead of in-house counsel or in-house statisticians, to more clearly delineate between work performed in anticipation of RIF-related litigation and work performed as a part of routine business operations. *See Allan G. Kin, Statistics as a Guide to RIF Selections: Caveat Emptor*, 20 Lab. Law 79, 91-92 (2004).
In Maloney v. Sisters of Charity Hospital, 165 F.R.D. 26, 29-30 (W.D.N.Y. 1995), the employer successfully asserted the work product doctrine to prevent disclosure of documents relating to a proposed RIF. The documents at issue were computer-generated reports containing statistics and other information generated by the human resources director and a worksheet containing the human resource director’s handwritten notes. Each of the documents was generated or prepared at the direction of counsel and in preparation for a meeting with counsel. Additionally, the court found that counsel had sufficiently articulated his reasonable belief that the large-scale RIF proposed by the employer was likely to result in litigation by affected employees. Counsel had formulated this belief at the time the documents were created, and it was based on his experience in the field of labor and employment law. The court contrasted these documents, which were prepared in anticipation of the specific type of discrimination claims asserted by plaintiffs, from documents that were prepared in the ordinary course of the employer’s business.

In Freiermuth v. PPG Industries, Inc., 218 F.R.D. 694 (N.D. Ala. 2003), the court distinguished Maloney and compelled disclosure of documents pertaining to a proposed RIF. While the documents at issue were not significantly different from those in Maloney, the court found that this defendant did not previously articulate that litigation was anticipated, that this RIF was unusual, or whether defendant had a history of litigation stemming from past workforce reductions. On the face of the documents, there was no indication that they were prepared at the request of counsel, that they were prepared in anticipation of litigation, or that there was an expectation of confidentiality associated with them. Additionally, defendant’s EEO manager stated that the purpose of creating the documents was to (1) seek legal advice and assess legal risk, and (2) determine whether the company was meeting its equal employment policy and accurately applying its RIF policy. The court found the second stated purpose of complying with company policy to be a part of routine business operations.

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Both cases involved fact-based documents that did not contain mental impressions, conclusions, opinions, or legal theories. The documents sought and obtained in Freiermuth were titled “Reduction in Force Worksheets” and contained the following information for seven employees: name, job title, hire date, performance ratings, success factor ratings in five categories, a computation of the success factor average, an overall average, indication of discipline or attendance problems, and a rank. For four of the employees, the worksheet also indicated the employee’s date of birth, race, and gender.
II. Attorney-Client Privilege

A. Overview

The attorney-client privilege protects communications from a client to an attorney for the purpose of obtaining legal advice, provided the communications were intended to be confidential. *Moore’s Federal Practice 3d*, § 26.49 [1]. The privilege is one of the oldest common-law privileges, and it applies when the client is a corporation. *Upjohn Co. v. United States*, 449 U.S. 383, 389-90 (1981). The Supreme Court reviewed its purposes and the rationale behind the privilege in *Upjohn*:

Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 913, 63 L.Ed.2d 186 (1980): “The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.” And in *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), we recognized the purpose of the privilege to be “to encourage clients to make full disclosure to their attorneys.”

*Id.* at 389.

Communications from an attorney to a client are not always privileged. Some courts hold that to be privileged, the document or communication must disclose or rely upon confidential communications from the client. *See, e.g., Potts v. Allis-Chalmers Corp.*, 118 F.R.D. 597 (N.D. Ind. 1987) (former in-house counsel’s recommendations to the employer about a severance plan are not subject to a blanket privilege; each communication must be reviewed independently).

Courts have recognized that when information is compiled for the purpose of facilitating communications between attorney and client in order to obtain legal advice, then any record or documentation of compiling such information is itself privileged. For example, in *In re LTV Securities Litigation*, the court found that the attorney-client privilege protected both communications that constituted the

Attorney-client privilege can include communications between a client and an agent of the attorney, as when the agent is acting under the authority and control of counsel and the communications are intended to be confidential. See *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989) (privilege applied to communications from client to accountant when attorney hired accountant to assist with defense strategy); *In re Alexander Grant & Co. Litig.*, 110 F.R.D. 545 (S.D. Fla. 1986) (privilege protected statements of employees who were aware information was being gathered for purpose of obtaining legal advice); *see also United States v. Brown*, 349 F. Supp. 420, 427 (N.D. Ill. 1972), aff’d as modified, 478 F.2d 1038 (7th Cir. 1973) (documents prepared by accountant, who was employed by attorney, were not privileged unless they contained communications made in confidence for purpose of obtaining legal advice).

The privilege does not shield all conversations at which an attorney is present, nor does it shield conversations involving business advice as opposed to legal advice. See *Neuder v. Batelle Pacific Northwest Nat. Lab.*, 194 F.R.D. 289, 293 (D.D.C. 2000) (discussion not privileged because business purpose took precedence over legal purpose when in-house counsel attended meeting as committee member to discuss proposed termination); *see also Tucker v. Fischbein*, 237 F.3d 275, 288 (3d Cir. 2001) (communications between editors and in-house counsel before magazine’s publication were for the purpose of obtaining legal advice regarding libel and, therefore, were privileged despite their regular occurrence).

**B. Employment Discrimination Cases**

*McDonnell Douglas Corp. v. EEOC*, 922 F. Supp. 235 (E.D. Mo. 1996), involved documents an employer produced to the EEOC in response to a subpoena. The documents, which were marked “Privileged Legal Communication,” included the adverse impact analysis performed for a RIF. Later, an employee filed a discrimination claim and sought the adverse impact analysis through a Freedom of Information Act (“FOIA”) request to the EEOC. *Id.* at 239. The employer unsuccessfully raised work product, attorney-client privilege, self-critical analysis
privilege, and FOIA exemptions before the EEOC. On appeal, the court found the
documents to be privileged because the analyses were prepared at the request of
counsel for the purpose of rendering legal advice, and the communications were
kept confidential. *Id.* at 243-44.

In *Evans v. Atwood*, the court emphasized that attorney-client privilege
protects communication from an attorney to a client only when that communication
would reveal confidential information communicated by the client. 177 F.R.D. at
3-6. For purposes of the privilege, information is considered confidential if, at the
time of the statement, the client reasonably believed no one would learn of the
contents and, but for its disclosure now, it would not have been revealed. The
court noted that, in most circumstances, the fact that someone consulted an
attorney for advice on a particular topic is not privileged. For example, it would
not necessarily implicate attorney-client privilege to learn that an agency was
considering a RIF and consulted an attorney for advice relating to that RIF. The
court asserted that an agency official asking an attorney whether a statute gives one
employee priority over another in a RIF would not disclose confidential client
communications and, therefore, would not be privileged. Thus, the court ordered
disclosure of those documents that did not reveal confidential information
conveyed by the client to the attorney. The court protected documents exchanged
between agency officials and counsel during union negotiations relating to the RIF
because those documents implicitly or explicitly revealed the agency’s bargaining
position and sought legal advice regarding the validity of that confidential position.
Finally, the court noted that circulating confidential information among concerned
agency officials did not result in a waiver of the privilege because all recipients
shared the attorney-client privilege with each other.

The court in *Freiermuth* considered attorney-client privilege to determine
whether the RIF worksheets at issue in that case could be shielded from discovery.
218 F.R.D. at 699-700. It concluded that the privilege did not apply. First, the
court noted that the worksheets had no markings that showed an intent to keep
them confidential or privileged. While such a marking alone is not enough to
protect an otherwise unprivileged document, the absence of that designation was
significant. Then, the court cited a lack of evidence regarding who had access to
the worksheets and whether any privilege might have been waived. Finally, and
most importantly, the court explained that attorney-client privilege does not
prevent disclosure of underlying facts. It characterized the worksheets as a “mere
compilation of facts supporting a reduction in workforce decision” that was later
reviewed by counsel. The court found these facts provided to counsel to support a
business decision involving a RIF to be distinguishable from a memorandum
analyzing the legal risk of a proposed RIF, which would be privileged. *Id.* at 699.
III. Self-Critical Analysis Privilege

A. Overview

The self-critical analysis privilege, also known as the “self-evaluative privilege,” is a qualified privilege that was first recognized in Bredice v. Doctor’s Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), aff’d mem., 479 F.2d 920 (D.C. Cir. 1973). In Bredice, the court barred discovery of the minutes and reports of a hospital staff review meeting in a medical malpractice action, noting that confidentiality of the medical staff’s assessment of potential improvements in its procedures and treatments was essential to the self-review process.

Since that decision, those courts endorsing this privilege have held that the privilege may be found where “an intrusion into the self-evaluative analyses of an institution would have an adverse effect on the [evaluative] process, with a net detriment to a cognizable public interest.” Cobb v. Rockefeller Univ., 1991 U.S. Dist. LEXIS 15278 (S.D.N.Y. Oct. 24, 1991). The court will then balance the discovering party’s need for the information against the other party’s interests in protecting the material from disclosure. Apex Oil Corp. v. DiMauro, 110 F.R.D. 490, 496 (S.D.N.Y. 1985); see also Solarex Corp. v. Arco Solar, Inc., 121 F.R.D. 163, 170 (E.D.N.Y. 1988), aff’d, 870 F.2d 642 (Fed. Cir. 1989).

Not all courts have adopted the self-critical analysis privilege. Particularly in the context of employment discrimination, a number of courts have refused to recognize the privilege, as described in more detail below.

B. Employment Discrimination Cases

Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. Ga. 1971), was first employment discrimination case involving the self-critical analysis privilege. In Banks, the plaintiffs sought discovery of an internal report prepared by the defendant’s equal employment opportunity team. The report “included a candid self-analysis and evaluation of the Company’s actions in the area of equal employment opportunities,” and the court found that it “had been made in an attempt to affirmatively strengthen the Company’s policy of compliance with Title VII and Executive Order 11246.” The court concluded that it would be contrary to public policy to discourage frank self-criticism and evaluation in the development of affirmative action programs and, therefore, protected the report from disclosure. However, the court ordered the defendant to produce any factual or statistical
information that was available to members of the research time when they conducted their study.

1. Cases Requiring Disclosure

Following Banks, a number of appellate courts reached the opposite conclusion and required disclosure of similar reports. See, e.g., In re Burlington N., Inc., 679 F.2d 762 (8th Cir. 1982); Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663 (4th Cir. 1977); Witten v. A.H. Smith & Co., 100 F.R.D. 446 (D. Md. 1984), aff’d, 785 F.2d 306 (4th Cir. 1986). The Supreme Court’s decision in University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) (refusing to recognize a qualified common law privilege against disclosure of confidential peer review materials relevant to a university professor’s discrimination claim) caused some courts to back away from the self-critical analysis privilege in employment discrimination cases. See Johnson v. United Parcel Service, Inc., 206 F.R.D. 686, 690-93 (M.D. Fla. 2002) (refusing to recognize self-critical analysis privilege in race discrimination action under Title VII).

Courts have also found that the need for relevant evidence of discrimination contained in reports outweighs the risk that production orders will curtail employers’ compliance efforts. See, e.g., Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 180, 62 FEP Cases (BNA) 570, 574 (S.D. Iowa 1993) (the privilege should not be recognized in the field of employment discrimination litigation because discovery will not likely chill employers’ self-evaluations, while the privilege may interfere with employees’ access to relevant information). In Etienne v. Mitre Corp., 146 F.R.D. 145 (E.D. Va. 1993), the court held that the self-critical analysis privilege did not bar disclosure of documents relating to an employer’s internal reviews of its compliance with the ADEA where (i) the documents are relevant, (ii) there is no evidence that disclosure of these documents would impair the employer’s ability or incentive to conduct similar employment policy reviews in the future, (iii) the public interest favors disclosure in employment cases, and (iv) the documents do not reveal confidential communications. Documents subject to production included statistical tables analyzing employees by race, ethnicity, gender, and age. However, the employer was permitted to redact data not pertaining to age since the plaintiff filed only an age discrimination claim.

The defendant in Tharp was required to produce the following portions of its affirmative action plans: “work force analysis,” “job group analysis,” “statement of goals,” “prior year affirmative action results,” and “identification of problem areas and development of action-oriented programs to eliminate problems.” Id. at 185.
2. Rationale

Courts have articulated the rationale for the self-critical analysis privilege differently in employment discrimination cases than in other cases. See Morgan v. Union Pacific R.R. Co., 182 F.R.D. 261, 265 (N.D. Ill. 1998) (explaining that the rationale for the privilege in employment discrimination cases, unlike tort cases, is to assure fairness to entities that are legally required to engage in self-evaluation). Thus, in employment discrimination cases, courts typically restrict the privilege to subjective materials prepared for mandatory government reports. See Tice v. American Airlines, Inc., 192 F.R.D. 270, 272 (N.D. Ill. 2000) (citing Morgan, 182 F.R.D. at 264-65) (setting forth the following requirements to assert the privilege in an employment discrimination case: (1) materials were prepared for mandatory government report, (2) privilege is being asserted only to protect subjective, evaluative materials, (3) privilege is not being asserted to protect objective data in the reports, and (4) policy favoring exclusion clearly outweighs plaintiff’s need for the information)); accord Steinle v. Boeing Co., 62 FEP Cases (BNA) 272, 278-79 (D. Kan. 1992); Resnick v. American Dental Ass’n, 95 F.R.D. 372, 374 (N.D. Ill. 1982).

3. Cases Preventing Disclosure

Where the privilege is upheld, the courts assert that the privilege furthers the public interest in compliance because disclosure would discourage the self-criticism needed for voluntary compliance with the law. See Flynn v. Goldman, Sachs & Co., 1993 U.S. Dist. LEXIS 12801 (S.D.N.Y. 1993) (noting that consultant’s reports relating to gender issues were not circulated beyond senior management and were treated as confidential); Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379 (N.D. Ga. 2001) (applying privilege to protect reports prepared for voluntary self-evaluation and for use in creating diversity initiatives, but refusing to protect affirmative action plan and compliance report because they contained primarily factual information). Nevertheless, since the Bredice and Banks decisions, there has been a great deal of uncertainty surrounding this privilege. Reid, 199 F.R.D. at 382.

4. Cases Involving RIFs

In Penk v. Oregon State Board of Education, 99 F.R.D. 506 (D.C. Or. 1982), the court required production of the portions of affirmative action reports that were statistical or descriptive of present conditions or future plans. It reasoned that such information could be disclosed without infringing upon an employer’s need for
self-critical evaluation. In contrast, the court allowed the employer to redact portions of the reports that were “self-evaluative,” although the court did not explain what that term encompassed. *Id.* at 507.

In addition to rejecting the work product doctrine and attorney-client privilege in *Freiermuth*, the court also refused to apply the self-critical analysis privilege. 218 F.R.D. at 696-698. The court recognized disagreement over the application of this privilege and noted that other district courts have rejected this privilege in the context of employment law. *Id.* at 697 (citing *Abdallah v. The Coca-Cola Co.*, 2000 WL 33249254 (N.D. Ga. 2000)). After weighing policy concerns, the court refused to recognize the self-critical analysis privilege in an employment-law case. In *dicta*, the court explained that, even if it were to adopt such a privilege, it would not protect the RIF worksheets at issue in this case because the privilege protects only subjective analysis, not the factual or statistical information contained in the worksheets.

5. Waiver

As with other privileges, the self-critical analysis privilege can be waived, so it is important not to voluntarily disclose privileged materials and to explicitly raise the privilege in response to a discovery request. See *Coates v. Johnson & Johnson*, 756 F.2d 524, 552 (7th Cir. 1985) (defendant’s use of its affirmative action plan at trial “waived whatever qualified privilege may have existed”). It is also prudent to object to privileged material sought by an EEOC subpoenas within five days. See 29 C.F.R. § 1601.16(b)(1); *EEOC v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999).
IV. Recommendations

Whether materials will be protected from disclosure will be made on a case-by-case basis, and the outcome may vary by jurisdiction. By implementing the following measures, a company can increase the likelihood that certain materials relating to a RIF might be protected from discovery in the event of litigation:

A. The company should prepare a written request for legal advice regarding RIF planning and implementation, and documents prepared by counsel (particularly any final report or summary) should explicitly refer to that request for legal advice.

B. Counsel should set forth in detail all of the potential litigation that is anticipated and why he or she believes such litigation is likely.

C. Counsel should coordinate and supervise the process of RIF planning and implementation.

D. Statisticians and consultants should be retained by counsel and report directly to counsel.

E. The formal retention letter for any statistician or consultant should set forth the elements of the applicable privileges and indicate that the individual’s assistance is necessary for the purpose of rendering legal advice to the company.

F. All correspondence and documents for which a privilege will be claimed should be created with the expectation that they will be considered confidential, and they should be treated as confidential at all times.

G. Access to discussions, correspondence, and documents should be restricted to only those individuals who need to have information or be involved, and this restricted access should be documented.

H. Reports, notes, communications, and other documents (in written and electronic format) should be labeled “privileged and confidential” and “attorney work product.”

I. To avoid the risk of waiving a privilege, the company should take measures to assure that no privileged material is voluntarily or inadvertently disclosed to a third party.

J. In the event of litigation, a statistician or other consultant who had been involved in RIF planning should not be retained as a testifying expert.
WARN ACT—RECENT CASES

Meson v. GATX Technology Services Corp., 507 F.3d 803 (4th Cir. 2007):

- The plaintiff appealed the district court’s grant of summary judgment against the defendant former employer alleging, inter alia, violations of the WARN Act. The Fourth U.S. Circuit Court of Appeals held that the plaintiff was not covered by the WARN Act.

- The plaintiff worked out of the defendant’s Virginia office, which employed fewer than 50 employees. The plaintiff argued that the defendant’s Tampa, Florida, headquarters (which had more than 50 employees), and not her Virginia office, was her “single site of employment” for purposes of WARN coverage. The Fourth Circuit disagreed.

- The Court noted that The WARN Act itself does not define "single site of employment, but that the U.S. Department of Labor promulgated interpretative regulations which were entitled to deference. The plaintiff relied on 20 C.F.R. § 639.3(i)(6), which provides that for workers whose primary duties require travel from point to point, are outstationed, or whose primary duties involve work outside of any of the employer’s regular employment sites, the “single site of employment” for WARN purposes is the single site to which they are assigned as their home base.

- The Fourth Circuit held that this regulation was intended to apply only to truly mobile workers without a regular, fixed place of work. The Court concluded that the plaintiff’s single site of employment under the WARN Act was her Virginia office, and this office did not have the requisite number of affected employees to trigger application of the WARN Act.


- The Fourth Circuit held that the defendant employer’s decision to pay all benefits and wages for 60 days without requiring work accorded with the language and purpose of the WARN Act.

- The Court rejected the plaintiffs’ argument that the date of the plant shutdown had to coincide with the date of the employment loss. The Court concluded that the employer’s decision was not an “employment termination” for purposes of the WARN Act.

- The Court also rejected the plaintiffs’ argument that the employer’s termination notice constituted a constructive discharge resulting in an employment loss.
Bader v. Northern Line Layers, Inc., 503 F.3d 813 (9th Cir. 2007):

- The employer, a specialty construction company, employed 33 workers at its Billings, Montana, office, with the remaining employees working at construction sites in seven states. The employees were laid off after the parent corporation merged the assets of the employer with another wholly-owned subsidiary. The employer did not provide 60 days advance notice prior to the layoffs.

- The Ninth U.S. Circuit Court of Appeals stated that no bright line test exists for determining whether separate work locations should constitute a “single site” of employment for purposes of the WARN Act, court seq. However, the Court noted that there was presumption against single site status for work locations that are not geographically proximate to each other.

- The Ninth Circuit concluded that employment locations in different states separated by hundreds of miles cannot be aggregated as a "single site" under the WARN Act. Moreover, the Court also concluded that the plaintiffs failed to demonstrate that the employer’s Billings location was responsible for the day-to-day management of the majority of workers at the remote construction project locations, or that the workers directly reported their progress to Billings. Therefore, the Court concluded, the employees did not demonstrate that 50 or more people were laid off at a single side of employment under the WARN Act.

Coppola v. Bear Stearns & Co., 499 F.3d 144 (2d Cir. 2007):

- Employees brought class action against employer’s creditor, alleging that creditor closed down employer’s principal offices in violation of the WARN Act. The Second Circuit held that the employer’s creditor was not liable as an employer under WARN.
WARN ACT—RECENT CASES (CONTINUED)

Allen v. Sybase, Inc., 468 F.3d 642 (10th Cir. 2006):

- The employer conducted three separate layoffs, resulting in the separations of 56 workers in a 58-day period between September 7 and October 31, 2001. The district court granted summary judgment in favor of the plaintiffs on their WARN claim. The Tenth U.S. Circuit Court of Appeals affirmed in part and reversed in part.

- First, the Court held that these 56 layoffs were properly aggregated for purposes of triggering the WARN notice requirements, because the employer could not demonstrate that the job losses were the result of separate and distinct causes. 468 F.3d at 652-63.

- Next, the Court rejected the employer’s argument that the employees had waived their right to sue the employer when they signed release forms upon their terminations. The Court noted that the plaintiffs’ WARN claims did not accrue until October 31, 2001—the date on which the employer terminated enough employees to constitute a mass layoff within the meaning of WARN—and the release forms pre-dated the accrual date and excluded future claims. Id. at 653-55.

- Third, the Tenth Circuit held that the district court had properly concluded that the employer had not shown that job terminations initiated on September 28 were due to the unforeseen financial impact of the September 11, 2001 attacks, since the employer failed to offer admissible evidence to support that conclusion and failed to properly request additional discovery time. Id. at 655-62.

- Finally, however, the Court held that the employer had demonstrated an issue of fact as to whether the plaintiffs were “aggrieved” within the meaning of WARN. The Court noted that even where a mass layoff has occurred, an employee who has suffered an employment loss in a mass layoff must still show he or she is "aggrieved" under the statute. The Court stated that aggrieved employees are those who lose their jobs in a mass layoff without receiving the notice WARN requires an employer to provide them as “affected employees.” Affected employees for purposes of WARN, in turn, are those who may reasonably be expected to experience an employment loss as a result of a proposed mass layoff by the employer. The Court noted that the employer presented sufficient evidence to demonstrate that it did not know in September 2001 that a mass layoff might occur the following month. This evidence was sufficient to create a fact question and warrant reversal of the district court’s entry of summary judgment in favor of the plaintiffs. Id. at 662-63.
§ 1625.21 Apprenticeship programs.

All apprenticeship programs, including those apprenticeship programs created or maintained by joint labor-management organizations, are subject to the prohibitions of sec. 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 623. Age limitations in apprenticeship programs are valid only if excepted under sec. 4(f)(1) of the Act, 29 U.S.C. 623(f)(1), or exempted by the Commission under sec. 9 of the Act, 29 U.S.C. 628, in accordance with the procedures set forth in 29 CFR 1627.15.

[61 FR 15378, Apr. 8, 1996]

§ 1625.22 Waivers of rights and claims under the ADEA.

(a) Introduction. (1) Congress amended the ADEA in 1990 to clarify the prohibitions against discrimination on the basis of age. In Title II of OWBPA, Congress addressed waivers of rights and claims under the ADEA, amending section 7 of the ADEA by adding a new subsection (f).

(2) Section 7(f)(1) of the ADEA expressly provides that waivers may be valid and enforceable under the ADEA only if the waiver is “knowing and voluntary.” Sections 7(f)(1) and 7(f)(2) of the ADEA set out the minimum requirements for determining whether a waiver is knowing and voluntary.

(3) Other facts and circumstances may bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver.

(4) The rules in this section apply to all waivers of ADEA rights and claims, regardless of whether the employee is employed in the private or public sector, including employment by the United States Government.

(b) Wording of Waiver Agreements. (1) Section 7(f)(1)(A) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that:

The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.

(2) The entire waiver agreement must be in writing.

(3) Waiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate. Employers should take into account such factors as the level of comprehension and education of typical participants. Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences.

(4) The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations.

(5) Section 7(f)(1)(H) of the ADEA, relating to exit incentive or other employment termination programs offered to a group or class of employees, also contains a requirement that information be conveyed “in writing in a manner calculated to be understood by the average participant.” The same standards applicable to the similar language in section 7(f)(1)(A) of the ADEA apply here as well.

(6) Section 7(f)(1)(B) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that “the waiver specifically refers to rights or claims under this Act.” Pursuant to this subsection, the waiver agreement must refer to the Age Discrimination in Employment Act (ADEA) by name in connection with the waiver.

(7) Section 7(f)(1)(E) of the ADEA requires that an individual must be “advised in writing to consult with an attorney prior to executing the agreement.”

(c) Waiver of future rights. (1) Section 7(f)(1)(C) of the ADEA provides that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the individual does not waive rights or claims
§ 1625.22

29 CFR Ch. XIV (7–1–07 Edition)
that may arise after the date the waiver is executed.

(2) The waiver of rights or claims that arise following the execution of a waiver is prohibited. However, section 7(f)(1)(C) of the ADEA does not bar, in a waiver that otherwise is consistent with statutory requirements, the enforcement of agreements to perform future employment-related actions such as the employee's agreement to retire or otherwise terminate employment at a future date.

(d) Consideration. (1) Section 7(f)(1)(D) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum * * * the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.

(2) “Consideration in addition” means anything of value in addition to that to which the individual is already entitled in the absence of a waiver.

(3) If a benefit or other thing of value was eliminated in contravention of law or contract, express or implied, the subsequent offer of such benefit or thing of value in connection with a waiver will not constitute “consideration” for purposes of section 7(f)(1) of the ADEA. Whether such elimination as to one employee or group of employees is in contravention of law or contract as to other employees, or to that individual employee at some later time, may vary depending on the facts and circumstances of each case.

(4) An employer is not required to give a person age 40 or older a greater amount of consideration than is given to a person under the age of 40, solely because of that person's membership in the protected class under the ADEA.

(e) Time periods. (1) Section 7(f)(1)(F) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum * * *

(i) The individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.

(2) Section 7(f)(1)(G) of the ADEA states:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

(3) The term “exit incentive or other employment termination program” includes both voluntary and involuntary programs.

(4) The 21 or 45 day period runs from the date of the employer's final offer. Material changes to the final offer restart the running of the 21 or 45 day period; changes made to the final offer that are not material do not restart the running of the 21 or 45 day period. The parties may agree that changes, whether material or immaterial, do not restart the running of the 21 or 45 day period.

(5) The 7 day revocation period cannot be shortened by the parties, by agreement or otherwise.

(6) An employee may sign a release prior to the end of the 21 or 45 day time period, thereby commencing the mandatory 7 day revocation period. This is permissible as long as the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 21 or 45 day time period, or by providing different terms to employees who sign the release prior to the expiration of such time period. However, if an employee signs a release before the expiration of the 21 or 45 day time period, the employer may expedite the processing of the consideration provided in exchange for the waiver.

(f) Informational requirements. (1) Introduction. (i) Section 7(f)(1)(H) of the ADEA provides that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) [which provides time periods for employees to consider the waiver] informs the individual in writing in a manner calculated to
be understood by the average individual eligible to participate, as to—

(i) 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

(ii) 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.

(ii) Section 7(f)(1)(H) of the ADEA addresses two principal issues: to whom information must be provided, and what information must be disclosed to such individuals.

(iii)(A) Section 7(f)(1)(H) of the ADEA references two types of "programs" under which employers seeking waivers must make written disclosures: "exit incentive programs" and "other employment termination programs." Usually an "exit incentive program" is a voluntary program offered to a group or class of employees where such employees are offered consideration in addition to anything of value to which the individuals are already entitled (hereinafter in this section, "additional consideration") in exchange for their decision to resign voluntarily and sign a waiver. Usually "other employment termination program" refers to a group or class of employees who were involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver.

(B) The question of the existence of a "program" will be decided based upon the facts and circumstances of each case. A "program" exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees. Typically, an involuntary termination program is a standardized formula or package of benefits that is available to two or more employees, while an exit incentive program typically is a standardized formula or package of benefits designed to induce employees to sever their employment voluntarily. In both cases, the terms of the programs generally are not subject to negotiation between the parties.

(C) Regardless of the type of program, the scope of the terms "class," "unit," "group," "job classification," and "organizational unit" is determined by examining the "decisional unit" at issue. (See paragraph (f)(3) of this section, "The Decisional Unit.")

(D) A "program" for purposes of the ADEA need not constitute an "employee benefit plan" for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). An employer may or may not have an ERISA severance plan in connection with its OWBPA program.

(iv) The purpose of the informational requirements is to provide an employee with enough information regarding the program to allow the employee to make an informed choice whether or not to sign a waiver agreement.

(2) To whom must the information be given. The required information must be given to each person in the decisional unit who is asked to sign a waiver agreement.

(3) The decisional unit. (i)(A) The terms "class," "unit," or "group" in section 7(f)(1)(H)(i) of the ADEA and "job classification or organizational unit" in section 7(f)(1)(H)(ii) of the ADEA refer to examples of categories or groupings of employees affected by a program within an employer's particular organizational structure. The terms are not meant to be an exclusive list of characterizations of an employer's organization.

(B) When identifying the scope of the "class, unit, or group," and "job classification or organizational unit," an employer should consider its organizational structure and decision-making process. A "decisional unit" is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. The term "decisional unit" has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program.

(ii)(A) The variety of terms used in section 7(f)(1)(H) of the ADEA demonstrates that employers often use differing terminology to describe their organizational structures. When identifying the population of the decisional unit, the employer acts on a case-by-
case basis, and thus the determination of the appropriate class, unit, or group, and job classification or organizational unit for purposes of section 7(f)(1)(H) of the ADEA also must be made on a case-by-case basis.

(B) The examples in paragraph (f)(3)(iii), of this section demonstrate that in appropriate cases some subgroup of a facility’s work force may be the decisional unit. In other situations, it may be appropriate for the decisional unit to comprise several facilities. However, as the decisional unit is typically no broader than the facility, in general the disclosure need be no broader than the facility. “Facility” as it is used throughout this section generally refers to place or location. However, in some circumstances terms such as “school,” “plant,” or “complex” may be more appropriate.

(C) Often, when utilizing a program an employer is attempting to reduce its workforce at a particular facility in an effort to eliminate what it deems to be excessive overhead, expenses, or costs from its organization at that facility. If the employer’s goal is the reduction of its workforce at a particular facility and that employer undertakes a decision-making process by which certain employees of the facility are selected for a program, and others are not selected for a program, then that facility generally will be the decisional unit for purposes of section 7(f)(1)(H) of the ADEA.

(D) However, if an employer seeks to terminate employees by exclusively considering a particular portion or subgroup of its operations at a specific facility, then that subgroup or portion of the workforce at that facility will be considered the decisional unit.

(E) Likewise, if the employer analyzes its operations at several facilities, specifically considers and compares ages, seniority rosters, or similar factors at differing facilities, and determines to focus its workforce reduction at a particular facility, then by the nature of that employer’s decision-making process the decisional unit would include all considered facilities and not just the facility selected for the reductions.

(iii) The following examples are not all-inclusive and are meant only to assist employers and employees in determining the appropriate decisional unit. Involuntary reductions in force typically are structured along one or more of the following lines:

(A) Facility-wide: Ten percent of the employees in the Springfield facility will be terminated within the next ten days;

(B) Division-wide: Fifteen of the employees in the Computer Division will be terminated in December;

(C) Department-wide: One-half of the workers in the Keyboard Department of the Computer Division will be terminated in December;

(D) Reporting: Ten percent of the employees who report to the Vice President for Sales, wherever the employees are located, will be terminated immediately;

(E) Job Category: Ten percent of all accountants, wherever the employees are located, will be terminated next week.

(iv) In the examples in paragraph (f)(3)(iii) of this section, the decisional units are, respectively:

(A) The Springfield facility;

(B) The Computer Division;

(C) The Keyboard Department;

(D) All employees reporting to the Vice President for Sales; and

(E) All accountants.

(v) While the particular circumstances of each termination program will determine the decisional unit, the following examples also may assist in determining when the decisional unit is other than the entire facility:

(A) A number of small facilities with interrelated functions and employees in a specific geographic area may comprise a single decisional unit;

(B) If a company utilizes personnel for a common function at more than one facility, the decisional unit for that function (i.e., accounting) may be broader than the one facility;

(C) A large facility with several distinct functions may comprise a number of decisional units; for example, if a single facility has distinct internal functions with no employee overlap (i.e., manufacturing, accounting, human resources), and the program is confined to a distinct function,
smaller decisional unit may be appropriate.

(vi)(A) For purposes of this section, higher level review of termination decisions generally will not change the size of the decisional unit unless the reviewing process alters its scope. For example, review by the Human Resources Department to monitor compliance with discrimination laws does not affect the decisional unit. Similarly, when a regional manager in charge of more than one facility reviews the termination decisions regarding one of those facilities, the review does not alter the decisional unit, which remains the one facility under consideration.

(B) However, if the regional manager in the course of review determines that persons in other facilities should also be considered for termination, the decisional unit becomes the population of all facilities considered. Further, if, for example, the regional manager and his three immediate subordinates jointly review the termination decisions, taking into account more than one facility, the decisional unit becomes the populations of all facilities considered.

(vii) This regulatory section is limited to the requirements of section 7(f)(1)(H) and is not intended to affect the scope of discovery or of substantive proceedings in the processing of charges of violation of the ADEA or in litigation involving such charges.

(4) Presentation of information. (i) The information provided must be in writing and must be written in a manner calculated to be understood by the average individual eligible to participate.

(ii) Information regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year (such as “age 20-30”) does not satisfy this requirement.

(iii) In a termination of persons in several established grade levels and/or other established subcategories within a job category or job title, the information shall be broken down by grade level or other subcategory.

(iv) If an employer in its disclosure combines information concerning both voluntary and involuntary terminations, the employer shall present the information in a manner that distinguishes between voluntary and involuntary terminations.

(v) If the terminations are selected from a subset of a decisional unit, the employer must still disclose information for the entire population of the decisional unit. For example, if the employer decides that a 10% RIF in the Accounting Department will come from the accountants whose performance is in the bottom one-third of the Division, the employer still must disclose information for all employees in the Accounting Department, even those who are the highest rated.

(vi) An involuntary termination program in a decisional unit may take place in successive increments over a period of time. Special rules apply to this situation. Specifically, information supplied with regard to the involuntary termination program should be cumulative, so that later terminees are provided ages and job titles or job categories, as appropriate, for all persons in the decisional unit at the beginning of the program and all persons terminated to date. There is no duty to supplement the information given to earlier terminees so long as the disclosure, at the time it is given, conforms to the requirements of this section.

(vii) The following example demonstrates one way in which the required information could be presented to the employees. (This example is not presented as a prototype notification agreement that automatically will comply with the ADEA. Each information disclosure must be structured based upon the individual case, taking into account the corporate structure, the population of the decisional unit, and the requirements of section 7(f)(1)(H) of the ADEA): Example: Y Corporation lost a major construction contract and determined that it must terminate 10% of the employees in the Construction Division. Y decided to offer all terminees $20,000 in severance pay in exchange for a waiver of all rights. The waiver provides the section 7(f)(1)(H) of the ADEA information as follows:
(A) The decisional unit is the Construction Division.

(B) All persons in the Construction Division are eligible for the program. All persons who are being terminated in our November RIF are selected for the program.

(C) All persons who are being offered consideration under a waiver agreement must sign the agreement and return it to the Personnel Office within 45 days after receiving the waiver. Once the signed waiver is returned to the Personnel Office, the employee has 7 days to revoke the waiver agreement.

(D) The following is a listing of the ages and job titles of persons in the Construction Division who were and were not selected for termination and the offer of consideration for signing a waiver:

<table>
<thead>
<tr>
<th>Job Title</th>
<th>Age</th>
<th>No. Selected</th>
<th>No. not selected</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Mechanical Engineers, I</td>
<td>25</td>
<td>21</td>
<td>48</td>
</tr>
<tr>
<td></td>
<td>26</td>
<td>11</td>
<td>73</td>
</tr>
<tr>
<td></td>
<td>63</td>
<td>4</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>64</td>
<td>3</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>28</td>
<td>3</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>29</td>
<td>11</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>Etc., for all ages</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td>(2) Mechanical Engineers, II</td>
<td>21</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>29</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Etc., for all ages</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>(3) Structural Engineers, I</td>
<td>21</td>
<td>10</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>26</td>
<td>10</td>
<td>11</td>
</tr>
</tbody>
</table>

(g) Waivers settling charges and lawsuits. (1) Section 7(f)(2) of the ADEA provides that:

A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum—

(A) Subparagraphs (A) through (E) of paragraph (1) have been met; and
(B) The individual is given a reasonable period of time within which to consider the settlement agreement.

(2) The language in section 7(f)(2) of the ADEA, "discrimination of a kind prohibited under section 4 or 15" refers to allegations of age discrimination of the type prohibited by the ADEA.

(3) The standards set out in paragraph (f) of this section for complying with the provisions of section 7(f)(1) (A)–(E) of the ADEA also apply for purposes of complying with the provisions of section 7(f)(2)(A) of the ADEA.

(4) The term "reasonable time within which to consider the settlement agreement," means reasonable under all the circumstances, including whether the individual is represented by counsel or has the assistance of counsel.

(5) However, while the time periods under section 7(f)(1) of the ADEA do not apply to subsection 7(f)(2) of the ADEA, a waiver agreement under this subsection that provides an employee the time periods specified in section 7(f)(1) of the ADEA will be considered "reasonable" for purposes of section 7(f)(2)(B) of the ADEA.

(6) A waiver agreement in compliance with this section that is in settlement of an EEOC charge does not require the participation or supervision of EEOC.

(h) Burden of proof. In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in section 7(f) of the ADEA, subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2) of section 7(f) of the ADEA.

(i) EEOC's enforcement powers. (1) Section 7(f)(4) of the ADEA states:

No waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may be used to
justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(2) No waiver agreement may include any provision prohibiting any individual from:
   (i) Filing a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or
   (ii) Participating in any investigation or proceeding conducted by EEOC.

(3) No waiver agreement may include any provision imposing any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to:
   (i) File a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or
   (ii) Participate in any investigation or proceeding conducted by EEOC.

(j) Effective date of this section. (1) This section is effective July 6, 1998.
   (2) This section applies to waivers offered by employers on or after the effective date specified in paragraph (j)(1) of this section.
   (3) No inference is to be drawn from this section regarding the validity of waivers offered prior to the effective date.

(k) Statutory authority. The regulations in this section are legislative regulations issued pursuant to section 9 of the ADEA and Title II of OWBPA.

[63 FR 30628, June 5, 1998]

§1625.23 Waivers of rights and claims: Tender back of consideration.

(a) An individual alleging that a waiver agreement, covenant not to sue, or other equivalent arrangement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with EEOC or any state or local fair employment practices agency acting as an EEOC referral agency for purposes of filing the charge with EEOC. Retention of consideration does not foreclose a challenge to any waiver agreement, covenant not to sue, or other equivalent arrangement; nor does the retention constitute the ratification of any waiver agreement, covenant not to sue, or other equivalent arrangement.

(b) No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement. This prohibition includes, but is not limited to, provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit. This rule is not intended to preclude employers from recovering attorneys' fees or costs specifically authorized under federal law.

(c) Restitution, recoupment, or setoff. (1) Where an employee successfully challenges a waiver agreement, covenant not to sue, or other equivalent arrangement, and prevails on the merits of an ADEA claim, courts have the discretion to determine whether an employer is entitled to restitution, recoupment or setoff (hereinafter, "reduction") against the employee's monetary award. A reduction never can exceed the amount recovered by the employee, or the consideration the employee received for signing the waiver agreement, covenant not to sue, or other equivalent arrangement, whichever is less.

(2) In a case involving more than one plaintiff, any reduction must be applied on a plaintiff-by-plaintiff basis. No individual's award can be reduced based on the consideration received by any other person.

(d) No employer may abrogate its duties to any signatory under a waiver agreement, covenant not to sue, or other equivalent arrangement, even if one or more of the signatories or the EEOC successfully challenges the validity of that agreement under the ADEA.

[65 FR 77446, Dec. 11, 2000]
OLDER WORKERS BENEFIT PROTECTION ACT—
RECENT CASES

Releases Held Invalid:

Syverson v. IBM, 472 F.3d 1072 (9th Cir. 2007):

- The Ninth Circuit Court of Appeals held that a severance waiver offered by the employer did not satisfy the OWBPA’s “knowing and voluntary” requirement. *Id.* at 1074. Ten employees who signed the waivers as part of their severance agreement challenged the “use of both a release covering ADEA claims and a covenant not to sue excepting them,” which together caused confusion over whether the employees could still assert ADEA claims. *Id.* at 1074-75.

- The Court found the waiver was confusing to the average employee and thus did not fulfill OWBPA’s requirement that “a waiver be part of an agreement ‘between the individual and the employer that is written in a manner calculated to be understood by [the] individual, or by the average individual eligible to participate’ in a workforce reduction plan.” *Id.* at 1076. The Court noted that the OWBPA requires waivers “‘drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate’” in a RIF. *Id.* at 1077.

- The Court ultimately agreed with the employees that the waiver, as drafted, did not satisfy OWBPA’s “manner calculated” requirement.

- Because the severance agreement’s covenant not to sue contained an exception for ADEA claims, understandable confusion ensued over whether employees could still litigate their ADEA claims. *Id.* at 1085. This confusing language did not satisfy the “manner calculated” requirement, which then rendered the agreement’s waiver not “knowing and voluntary” and, thus, unenforceable under the OWBPA. *Id.* at 1085-87.
OLDER WORKERS BENEFIT PROTECTION ACT—
RECENT CASES (CONTINUED)

Releases Held Invalid:

*Ruehl v. Viacom, Inc.*, 500 F.3d 375 (3d Cir. 2007):

- Employee’s waiver of ADEA claims held invalid under the OWBPA because the employer did not provide the demographic information as required by 29 U.S.C. § 626(f)(1)(H), *i.e.*, the employee units covered by the RIF, the employees eligible or selected for the RIF, and the employees in the same job classification not chosen or eligible for the RIF. 500 F.3d at 380-82; *see* 29 U.S.C.A. § 626(f)(1)(H). Rejecting the employer’s argument that the information was available and that the employer would have supplied the information to the employee had he asked for it, the Court stated that the OWBPA “places the burden on the employer to ensure that waivers are knowing and voluntary.” 500 F.3d at 381. Since the package did not supply the required information to the employee and did not contain any suggestion that the information existed and was available to the employee upon request, the waiver was unenforceable because it was not “knowing and voluntary.” *Id.*

*Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090 (10th Cir. 2006):

- Employer’s waiver agreement given to mill employees as part of a RIF held invalid it misidentified the “decisional unit,” or class of individuals considered for discharge. *Id.* at 1091. Section 626(f)(1)(H)(i) of the OWBPA requires that the employer attach information regarding its “decisional unit” as one of the requirements to render a waiver “knowing and voluntary.” *Id.* at 1093-94. In this case, the employer did attach information about a decisional unit, but it was incorrect information. *Id.* at 1094. The attachment indicated that the entire mill was part of the class considered for termination, when in fact the employees who did not report to the mill manager (over ten percent of the population) were not considered part of the decisional unit. *Id.* Because of the error, the Court held the waiver “invalid and unenforceable with respect to any age discrimination claim.” *Id.* at 1095-96.
Releases Held Valid:

*Burlison v. McDonald’s Corp.*, 455 F.3d 1242 (11th Cir. 2006):

- Reversing the trial court, the Eleventh Circuit Court of Appeals upheld waiver agreements given by an employer during a nationwide RIF. The waiver given by the employer contained decisional unit demographic information pertaining to the specific region in which the employees worked. *Id.* at 1244. The district court interpreted the OWBPA to require that the employer provide job titles and ages of all employees nationwide who were terminated, but the ages of only those employees in the same “decisional unit” as the terminated employees. *Id.* at 1245. After an analysis of the statutory language, the Eleventh Circuit reversed, holding that “the OWBPA’s informational requirements are limited to the decisional unit that applies to the discharged employees,” and are not supplied on a national scope. *Id.* at 1247. The waiver was upheld because the employer supplied the employees with appropriate region-specific decisional unit information. *Id.* at 1249.

*Parsons v. Pioneer Seed Hi-Bred Int’l, Inc.*, 447 F.3d 1102 (8th Cir. 2006):

- In finding that the employer’s waiver fulfilled the OWBPA’s statutory requirements, the Eighth Circuit Court of Appeals noted, among other things, that the “party asserting the validity of the waiver bears the burden of establishing that the agreement itself was written in a manner calculated to be understood.” *Id.* at 1105. As to this threshold question, the Court held that the issue was not whether the employee subjectively understood or even voiced confusion about the waiver when making a determination that the waiver was valid. *Id.* However, the employee’s subjective state of mind may be helpful when the Court attempts to determine whether the waiver made was “knowing and voluntary.” *Id.*