

Reductions in Force and Plant Closings

Reductions in Force and Plant Closings



Cynthia L. Jackson

Cynthia Jackson is an Employment Partner in Baker & McKenzie's Palo Alto office and Chair of the Northern California Employment Group. She graduated with a B.A. with honors from Stanford University and from the University of Texas School of Law with honors. She has been selected as Best Lawyers in America for the last five years. Ms. Jackson would like to thank Ashley Kimball for her assistance in updating the 2007 and 2008 editions.

Table of Contents

§18.1	I.	Introduction	.1
§18.2	II.	Planning a Reduction in Force	.1
	A.	Consider Alternatives to Layoff and Termination	.1
	§18.3	1. Offering Incentives for Voluntary Termination	.1
	§18.11	2. Transfers, Bumping, and Recall	.8
	B.	Establish Selection Criteria for Termination	.9
	§18.12	1. Neutral Criteria	.9
		2. Typical Criteria for Retaining or Laying Off Employees	.10
	§18.17	3. Prohibited Criteria	.11
	III.	Worker Adjustment and Retraining Notification Act (WARN)	.14
	A.	Background	.14
	B.	Covered Employers	.15
		1. Requisite Number of Employees	.15
	§18.24	2. Application to Independent Contractors and Subsidiaries	.16
	§18.25	3. Application on Sale or Acquisition	.17
	C.	Triggering Events	.17
		1. Definitions of “Plant Closing,” “Termination,” and “Mass Layoff”	.18
	§18.29	2. Definition of “Employment Loss” and “Layoff”	.19
	D.	Notice	.20
	§18.30	1. Required Recipients	.20
	§18.31	2. Contents	.21
		3. Timing of Notice	.22
	§18.37	4. Manner of Service	.25
	§18.38	5. Forms	.25
	E.	Liability for Violation of WARN Notice Requirements	.28
	F.	Defenses	.29
	§18.43	1. Statute of Limitations	.29
	§18.44	2. Waiver	.29
	IV.	Continuing Health Insurance Benefits	
	A.	COBRA	.29
	B.	Labor Code §2807	.30
	V.	Discrimination Claims	
	A.	Protected Categories	.30

B.	Showing Necessary to Support Discrimination Action . . .	31
	1. Disparate Treatment	31
	2. Disparate Impact	33
C.	Defenses	34

§18.56 VI. Breach of Contract and Related Claims

§18.57 VII. NLRA Compliance

A.	Subjects of Decision Bargaining	35
	§18.59 1. Total Plant Closings	35
	§18.60 2. Partial Plant Closings	36
	§18.61 3. Plant Relocations	36
	§18.62 4. Subcontracting to Nonunion Employees	37
B.	Subjects of Effects Bargaining	37
C.	The Duty to Bargain	38
	§18.65 1. Decision Bargaining	38
	§18.66 2. Effects Bargaining	38
D.	The Duty of Disclosure	39
E.	NLRB-Imposed Remedies	39
	§18.69 1. Decision Bargaining	40
	§18.70 2. Effects Bargaining	40
F.	Third Party Liability	41
	§18.71 1. Parent-Subsidiary	41
	§18.72 2. Effect of Bankruptcy Proceedings	41
G.	Statute of Limitations	41
H.	Preemption of State Law Claims by LMRA	41

§18.75 VIII. Bankruptcy Issues

A.	Employer Bankruptcy	42
	§18.76 1. Priority for Certain Wages and Benefits Claims	42
	§18.77 2. Employee Benefit Plan Contributions	43
	§18.78 3. Retiree Benefits	43
	§18.79 4. Employee Contract Termination Claims	43
	§18.80 5. Collective Bargaining Agreements	44
	§18.81 6. Non-NLRA Employment Agreements	44
	§18.82 7. Labor Union Standing and Plan of Reorganization	44
	§18.83 8. Nondischargeable Claims	44
B.	Employee Bankruptcy	44

§18.1 I. Introduction

This chapter summarizes the provisions of federal and California law that are implicated by reductions in force (RIFs), plant closings, and plant relocations. Two statutes that come into play under such circumstances are the Worker Adjustment and Retraining Notification Act (WARN) (29 USC §§2101–2109) and the California-specific mass layoff provisions of Lab C §§1400–1408. See §§18.20–18.44. If the employer’s workforce is organized, provisions of the National Labor Relations Act (29 USC §§141–187) are relevant. See §§18.57–18.74. If the workforce reduction or plant closing is necessitated by the employer’s failing financial health, bankruptcy issues must be considered. See §§18.75–18.84. Finally, a RIF often brings in its wake employee claims of discrimination, particularly age discrimination. Senior members of the workforce may be protected by the Older Workers Benefit Protection Act of 1990 (OWBPA) (Pub L 101–433, 104 Stat 978). See §§18.3–18.10. In preparing for and dealing with litigation following a RIF, plant closing, or plant relocation, the employer should give each of these subjects careful consideration.

§18.2 II. Planning a Reduction in Force

Unlike plant closures or relocations, which generally do not raise discrimination issues because they have equal impact across the workforce, reductions in force require employers to make decisions that affect some, but not all, employees. Consequently, some employees selected for adverse employment action may bring discrimination claims alleging that such action was taken because of a characteristic protected under federal or California law. See chap 15 on discrimination claims. Careful planning can avoid violations and prevent lawsuits. A legitimate RIF must be based on the elimination of positions and not of particular employees. See *Washington v Garrett* (9th Cir PAGE 16811993) 10 F3d 1421, 1429. An employer that attempts to use a RIF as a subterfuge for the termination of “problem” employees risks violating federal and state discrimination laws and breaching contractual obligations. To minimize liability, an employer planning a RIF, corporate reorganization, or downsizing should engage in a systematic review of its workforce composition and consider the steps set forth in §§18.3–18.19.

A. Consider Alternatives to Layoff and Termination

§18.3 1. Offering Incentives for Voluntary Termination

An employer planning a reduction in force should consider offering alternatives to involuntary terminations in exchange for a release of all claims. Such alternatives typically take the form of incentives such as the following:

- Early retirement plans;

- Severance plans; and
- Enhanced benefit plans.

There is no prohibition against offering a more favorable severance plan to employees who sign releases or waivers of claims (for example, 12 weeks of severance pay to employees who sign, versus 2 weeks of pay to those who do not).

Such incentives to voluntary termination do not violate the Age Discrimination in Employment Act of 1967 (ADEA) (29 USC §§621–634), as long as they:

- Are implemented in a nondiscriminatory fashion;
- Are not intended to avoid the dictates of the ADEA; and
- Do not require the involuntary retirement of employees based on their age. See 29 USC §623(f)(2)(B).

WARNING ➤ An employee who is pressured or coerced into leaving employment may later claim “constructive discharge” under California law. See §§17.29–17.33. To avoid this situation, employers should stress the voluntariness of the plan, allow employees a reasonable time to consider the plan, and encourage employees to consult with human resources personnel if they have questions.

a. Releases and Waivers of Claims

§18.4 (1) Basic Requirements for Standard Waiver

Under both federal and state law, a waiver of rights must be knowing and voluntary, as determined by the totality of the circumstances. See *Stroman v West Coast Grocery Co.* (9th Cir 1989) 884 F.2d 458, 462; *Allen v California Toll Bridge Auth.* (1977) 68 CA3d 340, 369, 137 CR 493. Fraud, duress, or coercion in connection with the execution of a waiver may render it void.

WARNING ➤ A general release is inadequate to waive claims unknown to the employee at the time of execution of the release that would materially affect the consent. See CC §1542; see also *Adams v Philip Morris, Inc.* (6th Cir 1995) 67 F.3d 580. The release must evidence a specific intent to waive claims that the employee does not know or suspect to exist in his or her favor.

§18.5 (2) Requirements for Waiver by Employees Age 40 and Over: OWBPA

The Older Workers Benefit Protection Act of 1990 (OWBPA) (Pub L 101–433, 104 Stat 978), amending the Age Discrimination in Employment Act of 1967 (ADEA) (29 USC §§621–634), sets forth specific requirements for enforceable releases of ADEA claims. 29 USC §626(f). A waiver and release of such claims under the OWBPA must be knowing and voluntary. A waiver may not be considered “knowing and voluntary” unless, *at a minimum* (29 USC §626(f)(1)):

- The waiver is 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; See *Syerson v. International Business Machines Corp.* (9th Cir 2006) 461 F.3d 1147, (holding an employee’s release agreement was unenforceable as to federal age discrimination claims

because the covenant not to sue was “commingled” with the release of claims, and therefore was held to be confusing to a lay person; which is prohibited in a release of ADEA claims);

- The waiver specifically refers to rights or claims arising under the ADEA;
- The individual does not waive rights or claims that may arise after the date the waiver is executed;
- The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
- The individual is advised in writing to consult with an attorney before executing the agreement;
- The individual is given a period of at least 21 days within which to consider the agreement (note that the 21-day period may be extended to 45 days when the waiver is requested as part of an exit incentive or other employment termination program offered to a group or class of employees—see §18.6); and
- The agreement may be revoked for up to 7 days after it is executed, and does not become effective until the 7 days have expired.

Because the statute does not specify how an employee may revoke his or her acceptance, the employer may wish to set forth a procedure in the release itself. **NOTE**➤ An employer may wish to delay payment of the release consideration until the 7-day period has passed to avoid the time and expense of payment recovery if the agreement is revoked.

Additional requirements apply when the waiver is part of a termination program offered to a group or class of employees. See §18.6.

NOTE➤ There is no requirement that older workers receive more consideration than younger workers in exchange for a general release, even though only the older workers waive ADEA claims. See *Griffin v Kraft Gen. Foods, Inc.* (11th Cir 1995) 62 F3d 368, 374; *DiBiase v Smithkline Beecham Corp.* (3d Cir 1995) 48 F3d 719.

§18.6 (3) Waiver for Group RIF

Special rules apply when the waiver is requested from an employee age 40 or over “in connection with an exit incentive or other employment termination program offered to a group or class of employees.” 29 USC §626(f)(1). Instead of the 21 days within which the individual employee can consider the agreement (see §18.5), 45 days are allotted to the employee who is part of a group or class. Moreover, the employer—in addition to having to comply with the requirements of a standard waiver—must inform the individual in writing as to:

- Any class, unit, or group of individuals covered by such a program;
- Any eligibility factors for the program and any time limits for applying for it; and
- The job titles and ages of all individuals eligible or selected for the program within the portion of the employer’s organization from which eligible

employees were chosen (*i.e.*, the “decisional unit”) and the ages of all individuals in the same decisional unit who are not eligible or selected for the program. 29 CFR §1625.22.

NOTE➤ The age statistics required to be provided with releases of age discrimination claims under the OWBPA are limited to the decisional unit considered for the discharged employees. The decisional unit is defined by the 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. See *Burlison v McDonald’s Corp.* (11th Cir 2006) 455 F3d 1242. The information the employer must provide regarding job titles and ages may include information concerning employees outside a single facility. *Griffin v Kraft Gen. Foods, Inc.* (11th Cir 1995) 62 F3d 368.

NOTE➤ Employers should use caution to ensure that the age statistics appendix is accurate and unambiguous, otherwise, there is a risk that a court will find the release invalid as to ADEA claims. There are a few reported decisions that hold employers to an extremely high standard with regard to the format and information contained in the release. See *Pagliolo v Guidant Corp.* (D. MN 2007), 483 F. Supp. 2d 847 (holding that the release failed to satisfy the OWBPA requirements because (i) the age appendix included employees who were redeployed within the company, which constituted a material misrepresentation, (ii) it failed to disclose the decisional units involved in the layoff, (iii) it failed to identify the eligibility factors used in determining employees selected for layoff, and (iv) it failed to adhere to formatting requirements with regard to age and job titles, therefore, the release was held to be void as to age claims). See also *Peterson, et. al. v. Seagate US LLC* (D. MN 2008) 2008 U.S. Dist. LEXIS 42179), (invalidating a release and holding that the release did not satisfy OWBPA requirements because it reported 154 employees were terminated when only 152 employees were, and because it did not clearly list the title and job codes of the employee groups).

§18.7 (a) No Ratification of Voidable Releases

It used to be an open question in the Ninth Circuit whether an employee whose release did not comply with the Older Workers Benefit Protection Act of 1990 (OWBPA) may subsequently ratify it, e.g., by continuing to accept benefits from the employer. Other circuit courts of appeal were split on this question. Compare *Blakeney v Lomas Info. Sys., Inc.* (5th Cir 1995) 65 F3d 482 (noncompliance with OWBPA rendered release voidable, but employees ratified by retaining severance pay), and *O’Shea v Commercial Credit Corp.* (4th Cir 1991) 930 F2d 358 (recognizing ratification of ADEA release before OWBPA), with *Oberg v Allied Van Lines, Inc.* (7th Cir 1993) 11 F3d 679 (noncompliance rendered release void; retaining consideration could not ratify release).

The Supreme Court has resolved the issue in favor of the employee. In *Oubre v Entergy Operations, Inc.* (1998) 522 US 422, 139 L Ed 2d 849, 118 S Ct 838, the

Supreme Court held that the employee's failure to return benefits received in consideration for releasing ADEA claims does not ratify a waiver that does not comply with the OWBPA. See also 29 CFR §1625.23.

§18.8 (b) Form: Release

18.8-1 Release

To: __ *[Name of employee age 40 and over]* __

Dear __ *[name of employee]* __:

This letter is to confirm our agreement with respect to the termination of your employment with __ *[name of employer]* __. To ensure that there are no ambiguities, this letter first explains in detail both your rights and obligations and those of __ *[name of employer]* __ on termination of your employment. If, in exchange for a Release, you wish to accept additional benefits to which you would otherwise not be entitled, indicate your agreement by signing, dating, and returning this letter to me by __ *[date; no less than 21 days for individual or 45 days for group termination]* __.

TERMINATION OF EMPLOYMENT

Your employment with __ *[name of employer]* __ will end effective __ *[date]* __. Thereafter, you will no longer be an employee of __ *[name of employer]* __. You will be paid __ *[dollar amount]* __, which constitutes all earned and unpaid salary together with any accrued and unused vacation pay, less deductions required or permitted by law in your final paycheck on __ *[last day of employment]* __.

In addition, you will receive __ *[describe any other benefits to which employee is entitled]* __. You also may __ *[insert COBRA conversion rights language/ refer to letter that will be provided]* __. __ *[Describe briefly any applicable vested pension benefits/refer to summary that will be provided.]* __ Please return all company property to __ *[e.g., human resources manager]* __ by __ *[date]* __.

In addition to the foregoing to which you are entitled, __ *[name of employer]* __ is prepared to offer you additional benefits to which you would otherwise not be entitled in exchange for an agreement to release all claims known or unknown against __ *[name of employer]* __, its affiliates, past, present, and future officers, directors, shareholders, agents, employees, attorneys, insurers, successors, and assigns. If you wish to accept such additional benefits in consideration for the Release, your signature at the conclusion of this letter will reflect your agreement. Before signing the Release, which is set forth below, you are advised to consult an attorney. You may take __ *[21/45]* __ days from receipt of this letter (i.e., until __ *[date]* __) to consider whether you wish to accept these additional benefits in exchange for the Release. Please also note that even if you do sign the Release, you may change your mind and revoke the Release and forego the additional benefits, provided you notify __ *[designate individual]* __ in writing within seven (7) days of your signing that you no longer want the additional benefits described below.

__ *[Signature]* __

__ *[Title]* __

RELEASE

This release is given in consideration of __ *[name of employer's]* __ additional payment of __ *[dollar amount]* __, less deductions authorized or required by law __ *[plus company contributions for medical benefits and pension enhancement]* __. This sum shall be paid in a lump sum, single payment ten (10) days after my termination date or ten (10) days after the Company's receipt of this signed unrevoked Release Agreement, whichever is later.

I understand that these are additional benefits for which I am not eligible unless I elect to sign this Release Agreement.

Released Claims

In consideration of these additional benefits, I, on behalf of my heirs, spouse, and assigns, hereby completely release and forever discharge __ *[name of employer]* __ (Company) from any and all claims, of any and every kind, nature, and character, known or unknown, foreseen or unforeseen, based on any act or omission occurring before the date of my signing this Release Agreement, including any claims arising out of my offer of employment, my employment, or termination of my employment with the Company. The matters released include any claims under federal, state, or local laws, including claims arising under the Age Discrimination in Employment Act of 1967 (ADEA) as amended by the Older Workers Benefit Protection Act (OWBPA), and any common-law tort, contract, or statutory claims, and any claims for attorney fees and costs.

I understand and agree that this Release Agreement extinguishes all claims, whether known or unknown, foreseen or unforeseen, except for those claims not released as expressly described below. I expressly waive any rights or benefits under Section 1542 of the California Civil Code, or any equivalent statute. California Civil Code Section 1542 provides as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

I fully understand that if any fact with respect to any matter covered by this Release Agreement is found hereafter to be other than or different from the facts now believed by me to be true, I expressly accept and assume that this Release Agreement shall be and remain effective, notwithstanding such difference in the facts.

Claims Not Released

The only claims not released through this Release Agreement are any claims that cannot be released by law, such as claims for unemployment benefits, workers' compensation, or claims relating to the validity of this Release Agreement under the ADEA as amended by the OWBPA.

Enforcement of This Release Agreement

I also understand and agree that if any suit, affirmative defense, or counterclaim is brought to enforce the provisions of this Release Agreement, with the exception of a claim brought by me regarding the validity of this Release Agreement under the ADEA as amended by the OWBPA, the prevailing party shall be entitled to its costs, expenses, and attorney fees as well as any and all other remedies specifically authorized under the law.

Miscellaneous

This Release Agreement constitutes the entire agreement between myself and the Company with respect to any matters referred to in this Release Agreement. This Release Agreement supersedes any and all of the other agreements between myself and the Company __ __ [, except for __ *[name of policy that is not superseded by this agreement]* __ __, attached hereto as Attachment 2, which remains in full force and effect]__ __. No other consideration, agreements, representations, oral statements, understandings, or course of conduct that are not expressly set forth in this Release Agreement should be implied or are binding. I am not relying upon any other agreement, representation, statement, omission, understanding, or course of conduct that is not expressly set forth in this Release Agreement. I understand and agree that this Release Agreement shall not be deemed or construed at any time or for any purposes as an admission of any liability or wrongdoing by either myself or the Company. I also agree that if any provision of this agreement is deemed invalid, the remaining provisions will still be given full force and effect. The terms and conditions of this agreement and release will be interpreted and construed in accordance with the laws of California.

Before execution of this Release Agreement, I have gathered sufficient relevant information to exercise my own judgment. The Company has informed me in writing to consult an attorney before signing this Agreement, if I wish. The Company has also given me at least [21/45] days in which to consider this Release Agreement, if I wish. I also understand that for a period of seven (7) days after I sign this Release Agreement I may revoke this Release Agreement and that the Release Agreement will not become effective until seven (7) days from my unrevoked signature.

I have read this Release Agreement and understand all of its terms. I further acknowledge and agree that this Release Agreement is executed voluntarily and with full knowledge of its legal significance.

I expressly agree that this Release Agreement becomes effective on my last day of employment or upon my timely signing of this Release Agreement, whichever is later.

Finally, I agree that I will not disclose voluntarily (except to my spouse, accountant, or lawyer) or allow anyone else to disclose either the existence of, reason for, or contents of this Release Agreement without the Company's prior written consent, unless required to do so by law.

EMPLOYEE'S ACCEPTANCE OF RELEASE

I have read the foregoing and understand, approve, and voluntarily agree to the terms of the Release in exchange for the additional benefits to which I would otherwise not be entitled.

Date: - - - - - [Employee's signature]

18.8–2 Optional addition to 18.8–1: Benefit enrichment for worker age 40 or over terminated in group RIF

Before I signed this Release Agreement, the Company advised me (1) that all employees laid off as a result of the [specify date] reduction in force have been given an opportunity to enrich their termination benefits in exchange for a Release Agreement, and that no such employee has been given more consideration for executing the Release Agreement in less than 45 days, and (2) of all individuals by job title and age in the same job classification or organizational unit who have been selected for layoff, and the job title and ages of all individuals in the same job classification or organizational unit who were not selected for layoff. A complete list of these individuals by job title and age is attached hereto as Attachment 1.

Comment: The above is one example of a release for an employee age 40 or over. Employers are strongly advised, however, to consult with counsel regarding the proper language and tone of the release, which may vary depending on the employee, the employment action, the benefits the employer provides, whether the employee has commenced litigation, and whether the employee is represented by counsel. Form 18.8–2 should be included if the employee is a worker age 40 or over facing termination under a group RIF (see §18.6). For discussion of COBRA rights, see §18.45.

§18.9 b. Claims Not Subject to Waiver

Although an employee can knowingly and intelligently waive most federal and state claims, the following may *not* be waived:

- The right to file a charge or participate in an investigation or proceeding conducted by the Equal Employment Opportunity Commission (29 USC §626(f)(4));

NOTE ➤ A waiver in *settlement* of an action filed either with the EEOC or in court must comply with the requirements set forth in §§18.4–18.8, but the individual need be given only a reasonable period of time within which to consider the settlement agreement. 29 USC §626(f)(2).

- Claims for wages indisputably due (Lab C §206.5);
- Claims under the workers’ compensation law, unless approved by the Workers’ Compensation Appeals Board or referee (Lab C §5001);
- Claims for state unemployment benefits (Un Ins C §1342).
- Claims arising under the FLSA, unless approved by the Department of Labor or a court (see *Barrentine v Arkansas-Best Freight Sys., Inc.* (1981) 450 US 728, 67 L Ed 2d 641, 101 S Ct 1437; *D.A. Schulte, Inc. v Gangi* (1946) 328 US 108, 90 L Ed 1114, 66 S Ct 925);
- Claims challenging the validity of a release under the OWBPA (29 CFR §1625.23(b));
- Claims arising under the Family and Medical Leave Act (FMLA); and
- Claims arising under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (38 U.S.C. § 4301; *Perez v. Uline, Inc.* (CA 4th 2007) 157 Cal. App. 4th 953).

NOTE ➤ There is a split of authority among the circuits about whether FMLA claims can be released without court approval. See 29 CFR §825.220(d); *Taylor v Progress Energy, Inc.* (4th Cir 2005) PAGE 1691415 F3d 364 (FMLA release invalid). But see *Butler v. Merrill Lynch Business Financial Services, Inc.* (N.D. IL 2008) 2008 U.S. Dist. LEXIS 63996; *Faris v Williams WPC-I, Inc.* (5th Cir 2003) 332 F3d 316 (FMLA release allowable).

§18.10 c. Tax Issues in Releasing ADEA and Title VII Claims

Whether settlement payment to the employee and payment to his or her counsel are subject to tax deductions, and how it is reported and to whom (e.g., a Form W2 or 1099) are likely to be areas of negotiation. Generally, if the amount paid to an employee is not for physical injury, it will be subject to deductions just like a wage payment and should be reported on a W2. If the payment is made without deductions, but it is questionable whether there was a “physical injury,” a hold harmless and indemnification agreement in favor of the employer should be included in the release that becomes effective, in the event a taxing authority later determines withholdings should have been made.

If a payment is made directly to the employee’s counsel for attorney fees and costs, it nevertheless should be reported on a Form 1099 to both the employee and the employee’s counsel (i.e., they both receive a 1099 for the portion of attorney fees and costs paid). See Treas Reg 1.6041–1(f); 26 USC §6045(f).

§18.11 2. Transfers, Bumping, and Recall

In the absence of a contractual obligation, an employer has no duty to transfer an employee whose position is eliminated as a result of a reduction in force. See *Trans World Airlines, Inc. v Thurston* (1985) 469 US 111, 83 L Ed 2d 523, 105 S

Ct 613; *Rose v Wells Fargo & Co.* (9th Cir 1990) 902 F2d 1417, 1422. Nor does the law impose an obligation on an employer to bump or recall employees when the employer has not obligated itself to do so by contract and does not maintain a practice or policy of doing so. See *Pfeifer v United States Shoe Corp.* (CD Cal 1987) 676 F Supp 969, 973; *Cox v Resilient Flooring Div. of Congoleum Corp.* (CD Cal 1986) 638 F Supp 726, 734. (“Bump” is a labor term of art that allows senior people who are transferred or who have their positions eliminated to “bump” junior people from their positions. *In re United Press Int’l, Inc.* (Bankr SD NY 1991) 134 BR 507, 510.) If an employer transfers some employees and not others, however, it must be able to justify its selection. See *Jackson v Shell Oil Co.* (9th Cir 1983) 702 F2d 197. A presumption of discrimination is raised when the employee can show that others outside the protected class were treated more favorably. See *Rose v Wells Fargo & Co.* (9th Cir 1990) 902 F2d 1417, 1422.

If an employer elects to adopt a recall policy, it should clearly identify the nature and scope of its obligations to avoid later claims of discrimination or breach of contract. See *Sakellar v Lockheed Missiles & Space Co.* (9th Cir 1985) 765 F2d 1453. The policy should set forth:

- The time period in which recall rights may be exercised;
- How recall rights are triggered, *e.g.*, automatically or by employee application;
- The position(s) for which the employee may be recalled; and
- What qualifications are relevant, *i.e.*, whether the policy requires the employer merely to consider the employee for the position, to give the employee a preference over outsiders, or to hire the employee without regard to the qualification of other applicants.

B. Establish Selection Criteria for Termination

§18.12 1. Neutral Criteria

An employer that can show it selected certain employees for termination based on neutral criteria will have a strong defense against a discrimination claim. Many employers use a procedure in which they identify specific factors relevant to an employee’s performance and status, assign particular weights to those factors, and then release employees with the lowest weighted score. See, *e.g.*, *Martin v Lockheed Missiles & Space Co.* (1994) 29 CA4th 1718, 35 CR2d 181 (granting summary judgment on California Fair Employment and Housing Act discrimination claim where employer identified lowest-scoring employees based on annual performance ratings and used a specially weighted performance rating giving more credit to senior employees); *Coburn v Pan Am. World Airways, Inc.* (DC Cir 1983) 711 F2d 339, 342 (affirming judgment notwithstanding verdict on Age Discrimination in Employment Act claim where Pan Am used numerical ranking system and evaluated personnel on basis of qualifications, abilities, productivity, and length of service with additional credit to employees over 40).

NOTE ➤ Employees who are out on pregnancy leave or leave under the Family and Medical Leave Act (29 USC §§2601–2654) or California’s Family Rights Act (Govt C §12945.2) are not entitled to any greater rights to reinstatement or other benefits of employment in a reduction in force than if they had been continuously employed. See 29 CFR §§825.216(a), 1604.10(b); 2 Cal Code Regs §§7291.9(c)(1), 7297.2(c).

2. Typical Criteria for Retaining or Laying Off Employees

§18.13 a. Merit

One of the most common criteria in selecting employees for layoff or termination is performance. The evaluation of performance, however, should be based as much as possible on objective criteria applied in a uniform way. Inclusion of subjective factors does not, per se, violate any laws (*Sengupta v Morrison-Knudsen Co.* (9th Cir 1986) 804 F2d 1072, 1075), but may bolster a statistical showing of discrimination or support a showing that the employer’s stated nondiscriminatory reason for selecting an employee is pretextual. *Gay v Waiters’ & Dairy Lunchmen’s Union, Local No. 30* (9th Cir 1982) 694 F2d 531, 554. An employer may wish to consider only the more recent evaluations or give those special weight.

§18.14 b. Versatility

In a shrinking workforce, versatility often becomes an important criterion. An employee’s ability to perform multiple tasks in a consolidation is often a heavily weighted factor. See *Sirvidas v Commonwealth Edison Co.* (7th Cir 1995) 60 F3d 375, 379; *Ingels v Thiokol Corp.* (10th Cir 1994) 42 F3d 616, 623; compare *Coleman v Quaker Oats Co.* (9th Cir 2000) 232 F3d 1271.

§18.15 c. Seniority

Seniority may be used as a criterion in decisions concerning retention or layoff. However, the employer’s seniority system may not be invoked in such a way as to circumvent protections under the Age Discrimination in Employment Act or Title VII, both of which provide that an employer may select employees for adverse employment action according to a bona fide seniority system. 29 USC §623(f)(2) (ADEA); 42 USC §2000e–2(h) (Title VII).

Seniority systems are typically contained in collective bargaining agreements governing unionized employees, but nonunionized employers also may adopt such systems consistent with *International Bhd. of Teamsters v U.S.* (1977) 431 US 324, 52 L Ed 2d 396, 97 S Ct 1843. Many employers, however, prefer to use a meritocracy system and provide that seniority is to be considered only in the event that all other factors are equal.

WARNING ➤ While targeting the least senior employees for termination or layoff minimizes ADEA claims, it may lead to other discrimination claims if it adversely impacts women and minorities who have recently entered the workforce as part of an affirmative action plan.

§18.16 d. Salary

The decision to select employees for layoffs based on their salaries may lead to age discrimination claims if older workers are adversely affected. Government Code §12941 explicitly provides that “the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group.”

§18.17 3. Prohibited Criteria

Employers that attempt to use a reduction in force to eliminate “problem” employees rather than job positions expose themselves to significant liability. It is unlawful to select an employee for adverse employment action for any of the following reasons:

- Age (29 USC §§621–634 (ADEA); Govt C §12940(a) (FEHA));
- Sex, race, color, religion, or national origin (42 USC §2000e–2(a) (Title VII); Govt C §12940(a) (FEHA));
- Pregnancy (42 USC §2000e(k); Govt C §§12926(p), 12940(a));
- Gender and gender identity (Govt C §§12926(p), 12940(a); Pen C §422.56);
- Marital status (Govt C §12940(a); 29 CFR §1604.4);
- Sexual orientation (Govt C §12940(a));
- Ancestry (Govt C §12940(a));
- Military Service (Mil & V C § 394; 38 USC §§4301-4333);
- A pension about to vest (29 USC §1140 (ERISA §510));
- Disability (42 USC §12112 (ADA); Govt C §12940(a);
- Medical condition (Govt C §§12926(h), 12940(a));
- Injury in the course of employment or filing a claim for workers’ compensation (Lab C §132a);
- The employee’s exercise of a protected right, such as filing a discrimination claim or unfair labor practice charge, reporting a suspected violation of the law, or acting as a witness in support of complaints of harassment (see *Taylor v City of Los Angeles Dep’t of Water & Power* (2006) 144 CA4th 1216, 51 CR3d 206);
- Concerted activity (29 USC §151; Lab C §923);
- Whistleblowing (Lab C §§1102.5, 1103);
- Disclosing amount of wages (Lab C §232); or
- Disclosing working conditions (Lab C §232.5).

NOTE ➤ As applicable to publicly traded companies, the Sarbanes-Oxley Act of 2002 (Pub L 107–204, 116 Stat 745) prohibits a company, or any officer, employee, contractor, subcontractor, or agent, from discriminating against (*e.g.*, discharging, demoting, suspending, threatening, harassing) an employee because of any lawful act done by the employee to provide information,

cause information to be provided, or otherwise assist in an investigation regarding any conduct that the employee reasonably believes constitutes a violation of the securities laws or mail fraud, when the information or assistance is provided to or the investigation is conducted by a federal regulatory or law enforcement agency, any member or Committee of Congress, or a person with supervisory authority over the employee. 18 USC §1514A. Additionally, it is a criminal offense (with individual liability) for an employer to discriminate against an employee for reporting “truthful information” relating to the commission of “any federal offense” to a law enforcement agency. 18 USC §1513(e). Aside from the Sarbanes-Oxley Act, retaliation for whistleblowing (on a variety of matters, not just those discussed here) is often actionable as a wrongful termination in violation of public policy under California tort law.

Employers also should not use a RIF as a convenient excuse to bypass contractual step discipline procedures. Such attempts to evade the employer’s normal progressive discipline procedures may result in claims of breach of contract and breach of the covenant of good faith and fair dealing, particularly if the employee is subsequently replaced.

§18.18 C. Notice

In addition to the measures described in §§18.12–18.17 to ensure compliance with federal and state civil rights statutes, an employer planning a reduction in force, depending on its circumstances and magnitude, may need to provide notice to its employees in compliance with the following:

- The Consolidated Omnibus Budget Reconciliation Act (COBRA) (29 USC §§1161–1169) (employer must notify group health plan administrator within 30 days after employees’ termination; administrator has 14 days thereafter to notify affected employees; later notice periods may be prescribed by a multiemployer group health plan in effect (29 USC §1166(a)(2), (c));
- Labor Code §2807 (employer must notify former employees of availability of continued medical, surgical, or hospital benefits);
- The Worker Adjustment and Retraining Notification Act (WARN) (29 USC §§2101–2109) (see §§18.20–18.44) and California layoff provisions (Lab C §§1400–1408);
- A collective bargaining agreement;
- An employment contract; or
- Personnel policy.

§18.19 D. Checklist: RIF Guidelines for Minimizing Litigation Risk

To avoid post-layoff claims, the following steps should guide the employer's implementation of a reduction in force:

- ___ 1. Articulate the business need and identify the business goal to be accomplished.
- ___ 2. Determine whether the reduction in force can be avoided or minimized by other cost-cutting measures such as salary or hiring freezes, voluntary attrition through early retirement plans, severance plans, enhanced benefit plans, or cutback in nonexempt hours.
- ___ 3. If a reduction in force is unavoidable, determine whether the reduction should be limited to only identified departments, organizations, or levels of managers, or be applied across-the-board.
- ___ 4. Once the affected units or levels have been determined, identify the positions that need to be eliminated or consolidated. In some situations, there may be only one incumbent. In other situations, there may be several incumbents and, therefore, individuals must be identified from the targeted positions.
- ___ 5. Set the criteria for selection. If criteria are weighted, articulate the weighted formula. While subjectivity is not per se unlawful, objective, weighted factors are the most defensible. If there is to be bumping between departments or different sites, determine the criteria for bumping. See §18.11 on "bumping."
- ___ 6. Rank multiple incumbents under the stated criteria. The lowest-ranked employees in the identified unit should ordinarily be the employees who are laid off, absent extraordinary circumstances.
- ___ 7. After a tentative list of layoff candidates has been generated, check the list for adverse impact by protected category such as race, sex, national origin, disability, and age (by 5-year brackets starting at the age of 40). Take a before-and-after "snapshot," noting what percentage of the workforce is in each category before the layoff and after the proposed layoff. If the tentative layoff list appears to disparately impact a protected group, re-analyze the selection criteria to ensure that there is no subtle form of illegal discrimination.
- ___ 8. To ensure that the selection is based solely on legitimate business reasons, review the tentative list for:
 - ___ a. "Whistleblowers";
 - ___ b. Workers' compensation claimants;
 - ___ c. People about to vest in, e.g., stock options, retirement plans.
- ___ 9. Determine whether additional compensation should be provided in exchange for a release of claims.

- ___ 10. Once the final determination has been made, ascertain whether the RIF will trigger WARN (or the state counterpart) notice requirements. See §§18.20–18.44.
- ___ 11. Provide COBRA notice (Lab C §2807; see §§18.45).
- ___ 12. Consider transition assistance such as outplacement.
- ___ 13. Provide managers with guidance on how to communicate information to the workforce and how to manage the reduced workforce after the RIF has taken effect.

III. Worker Adjustment and Retraining Notification Act (WARN)

§18.20 A. Background

In 1988, in response to the great number of plant closures and mass layoffs through the 1980s, Congress passed the Worker Adjustment and Retraining Notification Act (WARN) (29 USC §§2101–2109). The goal of the Act is to assist employees and their families and communities in preparing for a plant closure or mass layoff by requiring employers to provide advance notice of the decision and imposing penalties for noncompliance. With certain qualifications and exceptions discussed in §§18.32–18.36, WARN prohibits employers from (29 USC §2102(a))

order[ing] a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—

- (1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and
- (2) to the State or entity designated by the State to carry out rapid response activities [the State dislocated worker unit]... and the chief elected official of the unit of local government within which such closing or layoff is to occur.

The Department of Labor has promulgated regulations interpreting WARN. See 20 CFR §§639.1–639.10.

On September 21, 2002, California enacted AB 2957, effective January 1, 2003, which provides for analogous state law notice for “mass layoffs, relocations, and terminations.” Lab C §§1400–1408. For convenience, the Labor Code provisions will be referred to in this chapter as “California WARN.”

California WARN prohibits an employer from (Lab C §1401(a))

order[ing] a mass layoff, relocation, or termination at a covered establishment unless, 60 days before the order takes effect, the employer gives written notice of the order to the following:

- (1) The employees of the covered establishment affected by the order.
- (2) The Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs.

Because California WARN is analogous to the federal WARN, it is discussed below with the federal WARN requirements and definitions. Note, however, that the statutes are separate and distinct from one another, and there are important differences: California WARN applies to terminations at a “covered establishment” (rather than a “single site of employment”), and applies in cases of “mass layoff,” “relocation,” or “termination” (rather than “plant closing” or “mass layoff” under the federal WARN). As noted in the following sections, and by way of example, California WARN defines a mass layoff as a layoff of 50 employees or more during a 30-day period, irrespective of whether the layoff involves 33 percent of active employees. (See §18.27 about the 33-percent requirement.) Additionally, whether there is a “relocation” and “termination” is *not* dependent on a specific threshold number of employees being terminated.

§18.21 B. Covered Employers

The federal and California WARN apply to all employers with the threshold number of employees defined in §§18.22–18.23. Employers under the federal WARN include nonprofit organizations and public and quasi-public entities that engage in business and are administered independently from the government. The federal WARN statute does not apply to federal, state, or local governments and federally recognized Indian tribal governments. 20 CFR §639.3(a).

1. Requisite Number of Employees

§18.22 a. Employees Counted

Employers to which the federal WARN applies are all business enterprises that employ (29 USC §2101(a)(1)):

- 100 or more employees, excluding part-time employees; or
- 100 or more employees, including part-time employees, who in the aggregate work 4000 or more hours per week, excluding overtime.

The number of employees is calculated as of the date the first notice is required to be given. 20 CFR §639.5(a)(2). See §§18.30–18.41 on giving notice. A different reference point may be used for entities using seasonal employees. See, *e.g.*, *Marques v Telles Ranch, Inc.* (ND Cal 1994) 867 F Supp 1438, 1442 n3, aff’d without opinion (9th Cir 1997) 133 F3d 927.

The employees who count toward the statute's numerical threshold include:

- All workers employed for 20 or more hours per week or who have been employed for 6 or more of the 12 months preceding the date on which notice is required (29 USC §2101(a)(8); 20 CFR §639.3(h));
- Workers on temporary layoff or leave who have “a reasonable expectation of recall,” i.e., who understand, through notification or industry practice, that employment has been temporarily interrupted and that they will be recalled to the same or a similar job (20 CFR §639.3(a));
- Workers (excluding part-time workers) who are otherwise exempt from notice (20 CFR §639.3(a)).

For purposes of determining the number of employees that count towards the numerical threshold for WARN applicability, it is important to be aware that two companies may sometimes be considered one employer. Two former companies constituted one employer for purposes of WARN Act notification when one company with 88 employees acquired another with 18 employees, and the first then suddenly shut down its mill and laid off all the employees, while the other continued in business for several weeks, but then shut down and laid off all of its employees. *Childress v Darby Lumber, Inc.* (9th Cir 2004) 357 F3d 1000.

California WARN applies to all “covered establishments.” A “covered establishment” is defined as any industrial or commercial facility, or part of such facility, that employs or has employed within the preceding 12 months (of the date on which notice is required) 75 or more part-time or full-time employees. Lab C §1400(a), (h).

§18.23 b. Employees Not Counted

The federal WARN does not count as “employees” part-time employees who are employed (29 USC §2101(a)(8)):

- For fewer than 20 hours per week; or
- For fewer than 6 of the 12 preceding months from the date on which notice is required.

The California WARN statute does not exclude part-time employees. It does, however, exclude employees who are employed in seasonal employment when they are hired with the understanding that their employment is seasonal and temporary. Lab C §1400(g)(2).

§18.24 2. Application to Independent Contractors and Subsidiaries

Under the federal WARN, whether independent contractors and subsidiaries that are wholly or partly owned by a parent company count as separate employers or as part of the parent or contracting company depends on their independence from the parent or contracting company. Although Department of Labor regulations list five factors relevant to this determination (see 20 CFR

§639.3(a)(2)), they are intended only to summarize state and federal law, and do not foreclose reliance on “single employer” factors under other statutes. See *International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers v American Delivery Serv. Co.* (9th Cir 1995) 50 F3d 770, 775 (applying “single employer” factors of WARN and the Labor Management Relations Act concurrently); *Wholesale & Retail Food Distrib. Local 63 v Santa Fe Terminal Servs., Inc.* (CD Cal 1993) 826 F Supp 326, 334 (applying WARN factors and California corporation law).

The California WARN statute provides that a parent corporation is an employer as to any covered establishment directly owned and operated by its subsidiary. Lab C §1400(b).

§18.25 3. Application on Sale or Acquisition

Under the federal WARN, when all or part of a business is sold, the seller is the employer up to and including the effective date of sale. Thereafter the purchaser is the employer. See 29 USC §2101(b)(1); 20 CFR §639.4(c). See also *International Alliance of Theatrical & Stage Employees & Moving Picture Mach. Operators v Compact Video Servs., Inc.* (9th Cir 1995) 50 F3d 1464, 1467.

Unlike the federal WARN, the California statute does not include an express exception for the sale of a business. To date, California has nevertheless interpreted the California WARN statute consistently with the federal law in this regard. See *MacIsaac v Waste Mgmt. Collection & Recycling, Inc.* (2005) 134 CA4th 1076, 36 CR3d 650.

In cases involving the acquisition of a business by a secured creditor, bankruptcy trustee, or other fiduciary, the entity is an employer only if it is responsible for operating the business as a going concern. See *Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v Weslock Corp.* (9th Cir 1995) 66 F3d 241 (creditor who took control of business as collateral securing delinquent loan is not employer when it exercises only degree of control necessary to preserve business asset for liquidation or sale).

NOTE ➤ Determination that an enterprise is an “employer” for purposes of the WARN Act does not necessarily qualify that enterprise as an employer under any other law.

§18.26 C. Triggering Events

The notice requirements under the federal WARN are triggered by the occurrence of:

- A plant closing; or
- A mass layoff.

See 29 USC §§2101(a)(2)–(3), 2102(a).

California WARN applies to the following job actions at a “covered establishment” (Lab C §1401(a)):

- Termination;
- Mass layoff; and
- Relocation.

1. Definitions of “Plant Closing,” “Termination,” and “Mass Layoff”

§18.27 a. Duration; Number of Employees Affected

“Plant closing” under the federal WARN statute means the permanent or temporary shutdown of a single site of employment or a facility or operating unit within “a single site of employment” that results in (29 USC §2101(a)(2)):

- An “employment loss” at the single site of employment during any 30-day period, for
- 50 or more employees (excluding part-time employees).

See *Bader v Northern Line Layers, Inc.* (9th Cir 2007) 503 F3d 813 for a discussion of what constitutes a “single site of employment.” See §18.29 on “employment loss.”

California WARN does not address “plant closings.” Rather, it addresses “terminations” and “relocations.” A “termination” is defined as the cessation or “substantial cessation” of industrial or commercial operations in a covered establishment. Lab C §1400(f). “Relocation” is defined as the removal of all or substantially all of industrial or commercial operations to a different location 100 miles away or more. Lab C §1400(e). In contrast with federal WARN’s definition of “plant closing,” there is no specific numerical threshold under California WARN to trigger a “termination” or “relocation.”

“Mass layoff” under the federal WARN means a reduction in force (other than from a plant closing) that results in an employment loss at the single site of employment during any 30-day period, for (29 USC §2101(a)(3)):

- At least 33 percent of the employees (excluding any part-time employees) and at least 50 employees (excluding any part-time employees); or
- At least 500 employees (excluding any part-time employees).

California WARN defines a mass layoff as a layoff during any 30-day period of 50 or more employees at a covered establishment. Unlike the federal WARN, there is no 33-percent layoff percentage threshold. Lab C §1400(d).

Note that plant relocations resulting in reductions in force may qualify as “mass layoffs” under the federal WARN statute.

Department of Labor regulations also provide definitions for and examples of “facility or operating unit” (see 20 CFR §639.3(j)) and “single site of employment” (see 20 CFR §639.3(i)). See also *Teamsters Local Union 413 v Drivers, Inc.* (6th Cir 1996) 101 F3d 1107, 1110 (quasi-independent individual base terminals in different states distant from main office are each individual “single sites,” despite mobility of employee truck drivers); *Carpenters Dist. Council v Dillard Dep’t Stores, Inc.* (5th Cir 1994) 15 F3d 1275 (corporate

division and satellite facility constituted “single site”); *Williams v Phillips Petroleum Co.* (5th Cir 1994) 23 F3d 930 (plants in different states could not be “single site of employment”).

§18.28 b. Strikes and Other Exemptions

Under most circumstances, a strike or bona fide lockout or permanent replacement of economic strikers does not qualify as a plant closure or mass layoff under the federal WARN. See 29 USC §2103(2); 20 CFR §639.5(d).

California WARN differs in this respect, and does not have an exception for strikes, bona fide lockouts, or permanent replacements of economic strikers.

Neither does the federal WARN apply to plant closings or mass layoffs that result from the closing of a temporary facility or the completion of a finite project if the employer can prove that the employees were hired with the understanding that their employment was so limited. 29 USC §2103(1); 20 CFR §639.5(c)(2). This exemption may not apply when employees have a reasonable expectation of returning to work at the next available assignment. See, e.g., *Marques v Telles Ranch, Inc.* (ND Cal 1994) 867 F Supp 1438, 1444, aff’d without opinion (9th Cir 1997) 133 F3d 927 (employer treated harvesters as “permanent seasonal” employees who could expect to return to work at the beginning of each new season). The reasonableness of the employee’s expectation may be gauged from the terms of employment contracts and collective bargaining agreements and from industry and local practice. See 20 CFR §639.5(c)(2). See §18.20 about California WARN.

§18.29 2. Definition of “Employment Loss” and “Layoff”

The occurrence of a plant closing or mass layoff depends on an “employment loss” as that term is used in the federal WARN, which defines it as applicable only to (29 USC §2101(a)(6)):

- Any employment termination that is not a discharge for cause, voluntary departure, or retirement;
- A layoff of more than 6 months; or
- A reduction in individual employees’ work hours of more than 50 percent during each month of any 6-month period.

California WARN requires a “layoff,” which is defined as a separation from a position for lack of funds or lack of work. Lab C §1400(c).

When an employer undertakes more than one of the above employment actions, an employee may suffer multiple employment losses. Accordingly, each action may require a separate notice. *Graphic Communications Int’l Union, Local 31-N v Quebecor Printing (USA) Corp.* (4th Cir 2001) 252 F3d 296.

Employment losses by two or more groups within 90 days at a single site of employment will be aggregated to meet the definition unless the employer can show that the losses resulted from distinct causes and were not an attempt to evade the statute's requirements. 29 USC §2102(d). See §§18.30–18.41 on notice requirements.

Employment loss does not include:

- A technical loss due to the sale of a business, when the employees lose their employment with the former employer and become employees of the buyer (29 USC §2101(b)(1); *International Alliance of Theatrical & Stage Employees & Moving Picture Mach. Operators v Compact Video Servs., Inc.* (9th Cir 1995) 50 F3d 1464, 1467; see also *MacIsaac v Waste Mgmt. Collection & Recycling, Inc.* (2005) 134 CA4th 1076, 36 CR3d 650 (when offered the same position));
- A reduction in pay or benefits or the modification of employee handbooks (50 F3d at 1469);
- A reassignment or transfer to employer-sponsored programs such as retraining or job search activities (20 CFR §639.3(f)(2));
- Discharge for cause (29 USC §2101(a)(6)(A); see *Hollowell v Orleans Regional Hosp., LLC* (5th Cir 2000) 217 F3d 379); or
- The relocation or consolidation of part or all of the employer's business when, before the closing or layoff, the employer offered to transfer the employee with no more than a 6-month break in employment to (29 USC §2101(b)(2); 20 CFR §639.3(f)(3));
- A worksite at a reasonable commuting distance; or
- Any other worksite, and the employee accepts within 30 days of the offer of the closing or layoff, whichever is later.

California WARN does not contain the preceding exemptions; see §18.25 concerning the sale of a business.

D. Notice

§18.30 1. Required Recipients

Under the federal WARN, the employer must provide notice of the plant closing or mass layoff to:

- The chief elected officer of the exclusive representative or bargaining agent for the affected employees;

NOTE ➤ If the chief elected officer on whom notice is served is not a local union officer, it is advisable to serve notice on local union officials as well. See 20 CFR §639.6(a).

If the employees are not represented, the employer must provide notice to (29 USC §2102(a); 20 CFR §639.6):

- All employees who are reasonably expected to experience an employment loss (including part-time employees);
- California's dislocated worker unit at the Employment Development Department (see Directory for address and telephone number); and
- The chief elected official of the unit of local government in which the closing or layoff will occur.

Under California WARN, notice must be given to (Lab C §1401(a)):

- The affected employees;
- The Employment Development Department;
- The Local Workforce Investment Board; and
- The chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs. The EDD's website provides county-by-county information in this regard. See Directory.

§18.31 2. Contents

The notice of a plant closing or mass layoff must contain specific information prescribed by the federal WARN's implementing regulations. Depending on the recipient, the notice must include some or all of the following (20 CFR §639.7):

- The name and address of the employment site;
- A statement of whether the plant closing or mass layoff is permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
- The expected date or a 14-day period in which the terminations or layoffs are expected to occur;
- An indication of whether bumping rights exist (see §18.11);
- The names and job titles of employees who will be affected; and
- The name and telephone number of a company official to contact for further information.

The employer must provide the best information available at the time notice is given. Errors that occur as a result of later events and minor, inadvertent errors will not invalidate the notice or create liability under the statute. 20 CFR §639.7(a)(4); see *Marques v Telles Ranch, Inc.* (ND Cal 1994) 867 F Supp 1438, 1445, aff'd without opinion (9th Cir 1997) 133 F3d 927 (notice adequate even though employer failed to include bumping rights or name and address of company official to contact).

If the notice period has been shortened because of one of the exceptions discussed in §§18.33–18.36, the employer's notice must also include a brief statement of the reason for the reduced notice period. 20 CFR §639.9. A mere conclusory statement that the employer falls within one of the statutory exceptions is inadequate; the employer must set forth sufficient underlying facts that led to the shortened period to allow the employees to understand the situation.

See *Alarcon v Keller Indus., Inc.* (9th Cir 1994) 27 F3d 386, 389 (1-day notice adequately explained basis for faltering company exception). See §18.34 on the faltering company exception.

California WARN expressly incorporates these federal WARN notice requirements by reference. Lab C §1401(b).

3. Timing of Notice

§18.32 a. General Rule

Generally, the federal Worker Adjustment and Retraining Notification Act (WARN) requires that notice be given at least 60 calendar days in advance of the first individual termination that is part of the plant closing or mass layoff. 29 USC §2102(a).

To calculate whether the threshold number of employment losses has occurred for notice purposes, an employer should:

(1) Identify all employment losses that occurred or are planned in the 30 days behind and the 30 days ahead and calculate whether within any 30-day period, the aggregate number will satisfy the statutory minimum of 29 USC §§2101(a)(2)–(3); and

(2) Identify all employment losses that occurred or are planned in the 90 days behind and the 90 days ahead and calculate whether within any 90-day period, employment losses for two or more groups at a single site of employment in the aggregate number will satisfy the minimum of 29 USC §2102(d).

If the employer can prove that the employment losses result from separate and distinct causes and are not an attempt to evade the statute's requirements, no notice will be required. 20 CFR §639.5(a).

NOTE ➤ An employer does not violate the National Labor Relations Act (NLRA) (29 USC §§141–187) by giving notice in good faith to comply with the WARN. 29 USC §2108. Thus, an employer may give WARN notice before it has given the union notice or engaged in bargaining about a layoff or plant closure, and WARN notice may in fact constitute notice under the NLRA for purposes of the union requesting bargaining.

Similarly, under California WARN, the notice must be given 60 days before the mass layoff, relocation, or termination. Lab C §1401(a). For purposes of computing the threshold number of employment losses for “mass layoffs,” the operative period is 30 days forward or backward. Unlike the federal WARN, there is no express statutory or regulatory language that employment losses within 90 days are to be aggregated as part of the 50-employee threshold absent an employer's proof that the employment losses result from separate and distinct causes. Nevertheless, this is an area of potential ambiguity, and cautious employers may wish to include in their calculations layoffs both 90 days forward and backward. (Also, this is required under the federal WARN.)

§18.33 b. Exceptions

Congress recognized that a full 60 days' notice of a plant closing or mass layoff will not always be possible. Consequently, the statute provides that reduced notice is permissible in certain circumstances, so long as:

- (1) The employer includes in the notice a brief statement of the reason for reducing the notification period; and
- (2) The employer gives notice *as soon as is practicable*. 29 USC §2102(b).

However, an unwarranted delay in providing notice may create liability under the statute even when one of the exceptions discussed in §§18.34–18.36 applies. See, *e.g.*, *Wholesale & Retail Food Distrib. Local 63 v Santa Fe Terminal Servs., Inc.* (CD Cal 1993) 826 F Supp 326, 333 (7-day delay in sending out notice after occurrence of unforeseen business circumstance was not “notice as soon as practicable”).

§18.34 (1) Faltering Company Exception

Under the federal WARN, an employer may provide less than 60 days' notice of a plant closing if it was taking specific action to procure financing or business that would have enabled it to avoid or postpone the shutdown and the employer reasonably believed in good faith that giving notice would have precluded the employer from obtaining the necessary capital or business. 29 USC §2102(b)(1); 20 CFR §639.9(a). See, *e.g.*, *Alarcon v Keller Indus., Inc.* (9th Cir 1994) 27 F3d 386. In considering whether notice would have prevented the financing or business deal, the court may consider the finances of the company as a whole rather than of a particular facility or site. 20 CFR §639.9(a)(4).

Under California WARN, an employer is not required to comply with the notice for relocation or termination, if, at the time the notice would have been required (Lab C §1402.5(a)):

- The employer was actively seeking capital or business;
- The capital or business would have enabled the employer to avoid or postpone the relocation or termination; and
- The employer reasonably and in good faith believed that giving the notice would have precluded the employer from obtaining the needed capital or business.

The exception does not apply to a mass layoff.

§18.35 (2) Unforeseen Business Circumstance Exception

Under the federal WARN, reduced-time notice of a plant closing or mass layoff is permissible if the cause is a business circumstance not reasonably foreseeable at the time notice otherwise would have been required. 29 USC §2102(b)(2); 20 CFR §639.9(b). Such circumstances may include the termination of a major contract by a principal client, a strike at a major supplier, a dramatic economic downturn, a government ordered layoff, or a government order closing an

employment site. See, e.g., *Watson v Michigan Indus. Holdings, Inc.* (6th Cir 2002) 311 F3d 760, 765 (loss of major customer constituted unforeseen business circumstance); *Wholesale & Retail Food Distrib. Local 63 v Santa Fe Terminal Servs., Inc.* (CD Cal 1993) 826 F Supp 326, 332 (same); *International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers v American Delivery Serv. Co.* (9th Cir 1995) 50 F3d 770 (reversing summary judgment when supplier who terminated major contract was determined to be corporate parent of employer); *Buck v FDIC* (8th Cir 1996) 75 F3d 1285 (WARN Act does not apply in context of government-ordered closures over which employer has no control; bank employee layoffs as part of bank takeover were effectively ordered by government, not employer); *Deveraturda v Globe Aviation Security Servs.* (9th Cir 2006) 454 F3d 1043, 1046 (WARN does not apply when mass layoff is ordered by government (federal government ordered replacement of privately employed airport security personnel as part of federalization program, and employer had no control)).

In *Deveraturda*, the court distinguished *Hotel Employees & Restaurant Employees Int'l Union Local 54 v Elsinore Shore Assocs.* (3d Cir 1999) 173 F3d 175, 180, in which a state commission closed a gambling casino that failed to meet the commission's licensing conditions. In *Deveraturda*, the employer had nothing to do with the conditions that caused the layoffs, and could do nothing to remedy them. *Deveraturda*, 173 F3d at 1049 (critical inquiry is not what entity employed affected employees at time of layoff; rather, it is who ordered layoff to occur). The *Deveraturda* court also distinguished precedent in which courts applied WARN when the government canceled a contract that causes a mass layoff (see *Halkias v General Dynamics Corp.* (5th Cir 1998) 137 F3d 333, 335; *Loehrer v McDonnell Douglas Corp.* (8th Cir 1996) 98 F3d 1056, 1060) because they involved the "unforeseeable business circumstances" defense, not the issue of whether WARN actually applies, and because they did not involve an absolute government takeover of the employer's business resulting in government-ordered replacement of private employees with government employees. *Deveraturda*, 173 F3d at 1049.

An employer is not foreclosed from claiming the "unforeseen business circumstance" exception because of its failure to negotiate a notice or penalty provision in its customer contract. See 50 F3d at 777; *Wholesale & Retail Food Distrib. Local 63 v Santa Fe Terminal Servs., Inc.* (CD Cal 1993) 826 F Supp 326, 333; but see *Local 217, Hotel & Restaurant Employees Union v MHM, Inc.* (2d Cir 1992) 976 F2d 805.

California WARN does not include an "unforeseen business circumstance" exception.

§18.36 (3) Natural Disaster Exception

Natural disasters, such as floods, earthquakes, or droughts, that directly cause a plant closing or mass layoff may excuse the employer from complying with the 60-days' notice requirement. 29 USC §2102(b)(2); 20 CFR §639.9(c).

Under California WARN, notice is not required if a mass layoff, relocation, or plant closure is necessitated by a physical calamity or act of war. Lab C §1401(c).

§18.37 4. Manner of Service

Notice may be served by any reasonable means of delivery, including first-class mail, personal delivery with optional signed receipt, or insertion into employee pay envelopes. 20 CFR §639.8.

§18.38 5. Forms

The forms in §§18.39–18.41 exemplify notices that satisfy, minimally, the federal and California statutes’ notice requirements. An employer should tailor the notice to the circumstances. For example, it might be appropriate for an employer to incorporate the required information contained in the form in §18.39 into a more extensive letter dealing with severance, outplacement, and other benefits to be provided to affected employees.

§18.39 a. Form: Notice to Employees or Representative re: Mass Layoff

18.39-1 Notice to employees or representative re: mass layoff

NOTICE OF REDUCTION IN FORCE

Dear __[name of employee/union representative]__ :

As a result of __[describe triggering event]__, __[name of employer]__ will be eliminating various jobs and terminating the employment of many employees at __[name and address of worksite]__. __[You are one of the employees/All employees in, e.g., bargaining unit no. 123 are]__ affected by this reduction in force. Employee layoffs will commence on approximately __[date]__, and we anticipate that __[you/all affected employees]__ will be separated from the Company on or about __[date]__, or within 14 days thereafter.

The Company expects this workforce reduction to be permanent, and no bumping rights exist.

For further information, please contact __[name, address, and phone number of contact person]__.

Sincerely,
 __[Signature]__
 __[Title, e.g., Human Resources Manager]__

§18.40 b. Form: Notice to Chief Elected Government Official, State Dislocated Worker Unit, or Workforce Investment Board re: Mass Layoff

18.40-1 Notice to chief elected government official, state dislocated worker unit, or workforce investment board re: mass layoff

MASS LAYOFF NOTICE

Dear __[e.g., city mayor, chair of county board of supervisors]__ :

This letter is to advise the __[City of __[specify]__ /County of __[specify]__ /State of California]__ that __[name of employer]__ plans to terminate the employment of a number of employees, which may entail a “mass layoff” under the Worker Adjustment and Retraining Notification Act (WARN) or applicable state law. These terminations will occur at __[facility]__ located at __[address]__ . It is anticipated that these will be permanent terminations and that employee separations will commence on or about __[date]__ , and will continue over the following __[specify period of time, e.g., 3 months]__ . These terminations will affect a total of approximately __[specify number]__ employees in various positions in this facility, as follows:

Job Titles	Number of Employees
Office and Clerical	__[number]__
Professional and Managerial	__[number]__
__[Specify others]__	__[number]__
Total:	__[number]__

There are no bumping rights in existence, nor are there any unions representing the affected employees.

For further information, please contact __[name, address, and telephone number of contact person]__ .

Sincerely,
 __[Signature]__
 __[Title, e.g., Human Resources Manager]__

§18.41 c. Form: Notice to Chief Elected Government Official or Dislocated Worker Unit re: Plant Closing/Termination or Relocation

18.41-1 Notice to chief elected government official or dislocated worker unit re: plant closing/termination or relocation

FACILITY CLOSING NOTICE

Dear __[e.g., city mayor, chair of county board of supervisors]__ :

In accordance with the provisions of and regulations under the Worker Adjustment and Retraining Notification Act (WARN) or applicable state law, this letter is to advise the __[City of __[specify]__/County of __[specify]__/State of California]__ that __[name of employer]__ will close __[and relocate]__ its __[facility]__ located at __[address]__, on or about __[date]__. This will be a permanent closing __[and relocation]__ of the __[facility]__, and it is anticipated that the employee separations will commence and conclude on or about __[date]__. The closing will affect a total of __[specify number]__ employees in all positions in this Division, as follows:

Job Titles	Number of Employees
Executives	__[number]__
Clerical and Accounting	__[number]__
Engineers	__[number]__
Technicians	__[number]__
Manufacturing	__[number]__
Direct Labor	__[number]__
Managers & Supervisors	__[number]__
Quality Assurance	__[number]__
Inspectors	__[number]__
Total:	__[number]__

There are no applicable bumping rights in existence, nor are there any unions representing the affected employees.

For further information, please contact __[name, address, and telephone number of contact person]__.

Sincerely,
 __[Signature]__
 __[Title, e.g., Human Resources Manager]__

§18.42 E. Liability for Violation of WARN Notice Requirements

The Worker Adjustment and Retraining Notification Act (WARN) (29 USC §§2101–2109) provides stiff penalties for noncompliance. See 29 USC §2104. An employer may be forced to pay wages and benefits to each aggrieved employee for each day of violation, up to a maximum of 60 work days. 29 USC §2104(a)(1)–(2); *Burns v Stone Forest Indus., Inc.* (9th Cir 1998) 147 F3d 1182; but see *United Mine Workers v Eighty-Four Mining Co.* (3d Cir 2005) 159 Fed Appx 345 (holding minority view that damages are calculated based on number of calendar days in violation period). If the employer does not provide notice to the local unit of government, it is also subject to a civil penalty of up to \$500 per day, unless the employer pays each affected employee the amount for which it is liable within 3 weeks of the date the employer orders the plant closing or layoff. 29 USC §2104(a)(3). In its discretion, the court may allow the prevailing party to recover its reasonable attorney fees. 29 USC §2104(a)(6). The court may not, however, enjoin a plant closing or mass layoff as part of the remedy. 29 USC §2104(b).

NOTE ➤ Good Faith Exception: If the employer can prove it had reasonable grounds for believing its noncompliance was not a violation of federal or California WARN, a court may, in its discretion, reduce the employer’s liability. 29 USC §2104(a)(4); Lab C §1405; see *Graphic Communications Int’l Union, Local 31-N v Quebecor Printing (USA) Corp.* (4th Cir 2001) 252 F3d 296, 301 (and see opinion on remand: *Graphic Communications Int’l Union, Local 31-N v Quebecor Printing (USA) Corp.* (D Md 2002) 221 F Supp 2d 609); *Wholesale & Retail Food Distrib. Local 63 v Santa Fe Terminal Servs., Inc.* (CD Cal 1993) 826 F Supp 326, 335.

NOTE ➤ Penalty payments required by WARN may not be used to offset penalty payments assessed for violations of the National Labor Relations Act (29 USC §§141–187). *Times Herald Printing Co.* (1994) 315 NLRB 700.

In *United Food & Commercial Workers Union Local 751 v Brown Group, Inc.* (1996) 517 US 544, 134 L Ed 2d 758, 116 S Ct 1529, a unanimous United States Supreme Court ruled that unions have standing to sue on behalf of their members to recover damages for employer violations of WARN.

An employer who fails to give notice under California WARN is liable for back pay at the average regular rate of compensation received by the employee during the last 3 years of his or her employment, or the employee’s final rate of compensation, whichever is higher, and the value of the costs of any benefits to which the employee would have been entitled, including the costs of any medical expenses incurred by the employee that would have been covered under the employee benefit plan. The employer is liable for a period of up to 60 days or one-half the number of days the employee was employed, whichever period is smaller. Lab C §1402. As under federal law, the employer may be subject to a civil penalty of no more than \$500 per day, unless the employer

pays all applicable employees the amounts due under Lab C §1402 within 3 weeks from the date the employer orders the mass layoff, relocation, or termination. Lab C §1403. The court may award reasonable attorney fees. Lab C §1404.

F. Defenses

§18.43 1. Statute of Limitations

In *North Star Steel Co. v Thomas* (1995) 515 US 29, 132 L Ed 2d 27, 115 S Ct 1927, the United States Supreme Court held that the limitations period for civil enforcement actions brought under WARN is provided by state law and not analogous federal laws.

Inasmuch as California WARN does not have an express limitations period, it would arguably be covered by the 3-year limitation period for actions on liabilities created by statute (CCP §338(a)). See *Wholesale & Retail Food Distrib. Local 63 v Santa Fe Terminal Servs., Inc.* (CD Cal 1993) 826 F Supp 326, 329 (applying 3-year statute of limitations to federal WARN).

§18.44 2. Waiver

Employees who knowingly and voluntarily sign releases of their federal claims on termination may also be held to have waived their WARN claims, even if the release does not expressly mention the statute. See *Williams v Phillips Petroleum Co.* (5th Cir 1994) 23 F3d 930, 935. See §§18.3–18.10 on releases and waivers.

IV. Continuing Health Insurance Benefits

§18.45 A. COBRA

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) (29 USC §§1161–1169) requires employers employing 20 or more employees to offer an election of continuing health care coverage to qualified beneficiaries when there is a “qualifying event.” 29 USC §§1161–1162. For purposes of COBRA, qualifying events include the voluntary or involuntary termination of a covered employee’s employment (29 USC §1163), which clearly brings employers subject to WARN within the scope of COBRA’s requirement to offer the election.

California AB 1401 was enacted on September 22, 2002, providing that certain individuals who begin receiving COBRA coverage on or after January 1, 2003, may be eligible for additional COBRA coverage.

Specifically, this coverage provides up to 36 months of COBRA coverage after the exhaustion of the 18-month (or 29-month, in the event of Disability Determination) coverage period provided under federal law. In cases of employers not subject to federal COBRA, the legislation provides a 36-month coverage period for qualified beneficiaries, including the employee.

§18.46 B. Labor Code §2807

In California, Lab C §2807 requires that “all employers” distribute a standardized written description of the Health Insurance Premium Program established by the State Department of Health Services (along with any COBRA notice) to terminated employees.

V. Discrimination Claims

§18.47 A. Protected Categories

It is unlawful for an employer to discriminate on the basis of any of the following factors:

- Age (29 USC §§621–634 (Age Discrimination in Employment Act)); Govt C §12940(a) (FEHA));
- Sex, race, color, religion, or national origin (42 USC §2000e–2(a) (Title VII); Govt C §12940(a) (FEHA));
- Pregnancy (42 USC §2000e(k); Govt C §§12926(p), 12940(a));
- Gender and gender identity (Govt C §§12926(p), 12940(a); Pen C §422.56);
- Marital status (Govt C §12940(a); 29 CFR §1604.4);
- Sexual orientation (Govt C §12940(a));
- Ancestry (Govt C §12940(a));
- Military Service (Mil & V C § 394; 38 USC §§4301-4333);
- A pension about to vest (29 USC §1140 (ERISA §510));
- Disability (42 USC §12112 (ADA); Govt C §12940(a) (FEHA));
- Medical condition (Govt C §§12926(h), 12940(a));
- Injury in the course of employment or filing a claim for workers’ compensation (Lab C §132a);
- The employee’s exercise of a protected right, such as filing a discrimination claim or unfair labor practice charge, or reporting a suspected violation of the law (see, *e.g.*, Govt C §12940(h));
- Concerted activity (29 USC §151; Lab C §923);
- Whistleblowing (Lab C §§1102.5, 1103);
- Disclosing amount of wages (Lab C §232); or
- Disclosing working conditions (Lab C §232.5).

Alleged age discrimination is often an issue following a reduction in force. An employer may not discriminate on the basis of age against any employee. See Govt C §12940(a); 29 USC §§621–634 (ADEA) (prohibiting age discrimination against employees between the ages of 40 and 69); *O’Connor v Consolidated Coin Caterers Corp.* (1996) 517 US 308, 134 L Ed 2d 433, 116 S Ct 1307 (in wrongful termination case, plaintiff need not show that he was replaced by someone

outside protected class in order to establish prima facie case of age discrimination). To determine whether the RIF presents a risk of claims of discrimination, employers should review the proposed layoff list in 5-year age brackets (*i.e.*, 40–45, 45–50, 50–55) as well as by gender and minority status. Employers should be aware that the use of salary as a criterion for layoff is prohibited if it has a discriminatory effect on employees in the age-protected group. See Govt C §12941.

NOTE ➤ The Older Workers Benefit Protection Act of 1990 (OWBPA) (Pub L 101–433, 104 Stat 978) prohibits age discrimination in providing employee benefits and ensures that waiver of ADEA claims is knowing and voluntary. See 29 USC §§623, 626, 630. See also §15.23.

B. Showing Necessary to Support Discrimination Action

1. Disparate Treatment

§18.48 a. Prima Facie Case

Claims of discrimination may be based on the employer’s disparate treatment of categories of employees (see §§15.55–15.61). A prima facie case can be made for age discrimination (the most common claim following a reduction in force) by the plaintiff’s showing that he or she:

- Was 40 years old or older;
- Was performing his or her job in a satisfactory manner;
- Was discharged; and
- Was replaced by a substantially younger employee with equal or inferior qualifications. But see *Begnal v Canfield & Assocs.* (2000) 78 CA4th 66, 92 CR2d 611, which held that a plaintiff who is replaced by an older person can nevertheless prove age discrimination through other direct or circumstantial evidence of such discrimination. See also *Diaz v. Eagle Produce Ltd. Partnership* (9th Cir. 2008) 2008 U.S. App. LEXIS 7261, stating that the 9th Circuit will treat this element with “flexibility.”

See *Wallis v J.R. Simplot Co.* (9th Cir 1994) 26 F3d 885, 891; *Washington v Garrett* (9th Cir 1993) 10 F3d 1421; *Rose v Wells Fargo & Co.* (9th Cir 1990) 902 F2d 1417, 1421. See also *O’Connor v Consolidated Coin Caterers Corp.* (1996) 517 US 308, 134 L Ed 2d 433, 116 S Ct 1307.

NOTE ➤ A disparate treatment and disparate impact analysis should be considered before the employer undertakes a RIF.

The length of time between the plaintiff’s termination and alleged replacement also bears on the strength of the prima facie case. See *Rose v Wells Fargo & Co.* (9th Cir 1990) 902 F2d 1417, 1422; *Raschick v Prudent Supply, Inc.* (8th Cir 1987) 830 F2d 1497, 1498.

Even if the plaintiff was not replaced as a result of the RIF, he or she still may establish a prima facie case through circumstantial or statistical evidence showing that the discharge occurred under circumstances giving rise to an inference of age discrimination. *Rose v Wells Fargo & Co.* (9th Cir 1990) 902 F2d 1417, 1421. Courts impose a heavy burden of proof, however, on plaintiffs relying on circumstantial evidence to show such discrimination. See *Leichihman v Pickwick Int'l* (8th Cir 1987) 814 F2d 1263, 1270:

[I]n a reduction-in-force case, there is no adverse inference to be drawn from an employee's discharge if his position and duties are completely eliminated.... If [the discharged employee] cannot show that [his employer] had some continuing need for his skills and services in that his various duties were still being performed, then the basis of his claim collapses.

See also *Ritter v Hughes Aircraft Co.* (9th Cir 1995) 58 F3d 454, 457 (insufficient circumstantial evidence to raise inference of age discrimination). When the employee relies only on statistical evidence, the statistics "must show a stark pattern of discrimination unexplainable on grounds other than age." *Rose v Wells Fargo & Co.* (9th Cir 1990) 902 F2d 1417, 1423, quoting *Palmer v U.S.* (9th Cir 1986) 794 F2d 534, 539. See also *Nesbit v Pepsico, Inc.* (9th Cir 1993) 994 F2d 703, 705 (insufficient statistical showing).

NOTE ➤ This greater burden of proof for ADEA plaintiffs in RIF cases may not apply to claims under California's Fair Employment and Housing Act. See *Clark v Claremont Univ. Ctr.* (1992) 6 CA4th 639, 670, 8 CR2d 151.

§18.49 b. Rebuttal

The shifting burden of persuasion applied to a Title VII discrimination claim also applies to claims arising under the Age Discrimination in Employment Act. See *O'Connor v Consolidated Coin Caterers Corp.* (1996) 517 US 308, 134 L Ed 2d 433, 116 S Ct 1307 (assuming, but not deciding, that the McDonnell Douglas evidentiary framework applies to ADEA cases); *Pottenger v Potlatch Corp.* (9th Cir 2003) 329 F3d 740, 745; *Palmer v U.S.* (9th Cir 1986) 794 F2d 534, 537. Once the employee has established a prima facie case of discrimination, the burden of production shifts to the employer to produce some evidence that it had a legitimate, nondiscriminatory reason for the employment action. *Watson v Fort Worth Bank & Trust* (1988) 487 US 977, 101 L Ed 2d 827, 108 S Ct 2777. It may assert, for example, that the decision resulted from legitimate economic considerations underlying the reduction in force. See, e.g., *Ritter v Hughes Aircraft Co.* (9th Cir 1995) 58 F3d 454, 458; *Martin v Lockheed Missiles & Space Co.* (1994) 29 CA4th 1718, 1731, 35 CR2d 181. When the plaintiff's claim arises from a reduction in force, the employer may rebut by showing that it used neutral selection criteria for determining who would be terminated. See 29 CA4th at 1731; *Coburn v Pan Am. World Airways, Inc.* (DC Cir 1983) 711 F2d 339, 342 (see §18.12). The employer may also rebut the plaintiff's statistical data with its own. See, e.g., *Rose v Wells Fargo & Co.* (9th Cir 1990) 902 F2d 1417, 1423 n5 (employer showed that average age and mix of workforce before and after employment action were approximately the same).

§18.50 c. Pretext

If the employer successfully rebuts the plaintiff's prima facie case (see §§18.48–18.49), the plaintiff has the burden of showing by a preponderance of the evidence that the employer's asserted reason for its action is pretextual. *St. Mary's Honor Ctr. v Hicks* (1993) 509 US 502, 125 L Ed 2d 407, 113 S Ct 2742.

Unsubstantiated suspicions of discrimination will not prove pretext and will not create a genuine issue of material fact to withstand summary judgment. See *Soules v Cadam, Inc.* (1991) 2 CA4th 390, 398, 3 CR2d 6 (FEHA); *Elliott v Group Med. & Surgical Serv.* (5th Cir 1983) 714 F2d 556, 567 (ADEA). A plaintiff's ability to establish a prima facie case of age discrimination, however, combined with sufficient evidence that the employer's proffered reason for the employment action is false, may permit the trier of fact to infer the ultimate fact of discrimination. *Reeves v Sanderson Plumbing Prods., Inc.* (2000) 530 US 133, 147 L Ed 2d 105, 120 S Ct 2097 (reversing Fifth Circuit's ruling that evidence was insufficient to sustain jury's finding that employer had discriminated against employee on basis of age).

In an age discrimination case, the plaintiff's ultimate burden may be especially heavy in the context of a corporate reorganization. See *Simpson v Midland-Ross Corp.* (6th Cir 1987) 823 F2d 937.

2. Disparate Impact

§18.51 a. Prima Facie Case

A disparate impact claim challenges employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. *Atonio v Wards Cove Packing Co.* (9th Cir 1987) 810 F2d 1477, 1480. See Govt C §12941. To establish a prima facie case of disparate impact, an employee must:

- Identify the specific employment practice challenged;
- Show that it has a disparate impact on a protected category; and
- Prove causation, *i.e.*, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of individuals because of their membership in a protected group.

See *Rose v Wells Fargo & Co.* (9th Cir 1990) 902 F2d 1417, 1424 (citing *Watson v Fort Worth Bank & Trust* (1988) 487 US 977, 994, 101 L Ed 2d 827, 108 S Ct 2777); *Ibarbia v Regents of Univ. of Cal.* (1987) 191 CA3d 1318, 237 CR 92. See generally, §§15.62–15.64.

The labor pool from which statistical evidence is drawn must be sufficiently large to identify a meaningful pattern. See *Shutt v Sandoz Crop Protection Corp.* (9th Cir 1991) 944 F2d 1431 (when employee was terminated in RIF as part of merger, statistically relevant pool was composed of similarly situated employees in merged corporation).

§18.52 b. Rebuttal

The employer may rebut the plaintiff's claim of disparate impact by discrediting plaintiff's statistics or proffering statistics of its own to show that no disparity exists. The employer may also produce evidence that its disparate employment practices are based on legitimate business reasons, such as job-relatedness or business necessity. *Rose v Wells Fargo & Co.* (9th Cir 1990) 902 F2d 1417, 1424. See §§15.43–15.44, 15.68 on the job-relatedness and business necessity defenses.

§18.53 c. Nondiscriminatory Alternatives

If the employer can rebut the plaintiff's prima facie case with, *e.g.*, evidence of job-relatedness or business necessity, the plaintiff must produce evidence that other selection practices that do *not* have a discriminatory effect would also serve the employer's interests. *Shutt v Sandoz Crop Protection Corp.* (9th Cir 1991) 944 F2d 1431.

§18.54 d. Adverse Impact Analysis for Age Discrimination

The availability of a claim of discrimination under the ADEA based on disparate impact was in doubt in many circuits following the Supreme Court's decision in *Hazen Paper Co. v Biggins* (1993) 507 US 604, 123 L Ed 2d 338, 347, 351, 113 S Ct 1701. The Court, however, has clarified its position on the issue. In *Smith v City of Jackson* (2005) 544 US 228, 161 L Ed 2d 410, 125 S Ct 1536, the court recognized that employers may be sued under the ADEA for actions that have a disparate impact on older workers. It held that the scope of disparate impact liability under the ADEA is narrower than under Title VII, and an employee bringing an ADEA claim under the disparate impact theory must identify a specific test, requirement, or practice that has an adverse impact on a protected group. In California, a disparate impact claim is also available under FEHA (Govt C §§12900–12996), which specifies that age discrimination is found if the use of salary as a basis for termination adversely impacts older employees. Govt C §12941.

§18.55 C. Defenses

An employer faced with a discrimination suit following a reduction in force may draw on an array of defenses, including that:

- The termination decision was based on reasonable factors other than plaintiff's protected status;
- The plaintiff was terminated for good cause;
- The employer was observing the terms of a bona fide seniority system, bona fide employee benefit plan, or bona fide merit system;
- The protected characteristic (*e.g.*, age) was a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business. See, *e.g.*, *Western Air Lines, Inc. v Criswell* (1985) 472 US 400, 86 L Ed 2d 321, 105 S Ct 2743 (age 60 retirement requirement for flight engineers was reasonably necessary to safe operation of airline).

§18.56 VI. Breach of Contract and Related Claims

California law provides employees with an array of common-law and statutory claims that may be asserted following an employment termination. Claims of breach of contract, breach of the implied covenant of good faith and fair dealing, constructive or wrongful discharge, violation of the Fair Employment and Housing Act (FEHA) (Govt C §§12900–12996), and violation of public policy are discussed in chap 17.

Employers should be aware that a legitimate reduction in force provides its own defense to claims of breach of implied contract and breach of the covenant of good faith and fair dealing. As a policy matter, courts avoid second-guessing the business decisions of employers, and hold that the defense of good cause for termination exists as a matter of law when the RIF is based on lack of work or other legitimate business considerations. See *Malmstrom v Kaiser Aluminum & Chem. Corp.* (1986) 187 CA3d 299, 231 CR 820; *Gianaculas v Trans World Airlines, Inc.* (9th Cir 1985) 761 F2d 1391, 1395; *Cox v Resilient Flooring Div. of Congoleum Corp.* (CD Cal 1986) 638 F Supp 726.

§18.57 VII. NLRA Compliance

Special issues arise when the workforce involved in a plant closing, plant relocation, or RIF is unionized. Before undertaking any employment action, an employer should carefully consider whether it has a statutory duty to bargain with the union over its decision or the effects of its decision and whether it must satisfy any other obligations under its collective bargaining agreement.

§18.58 A. Subjects of Decision Bargaining

The National Labor Relations Act (NLRA) (29 USC §§141–187) imposes on employers a duty to bargain with its employees’ representative in good faith over “wages, hours, and other terms and conditions of employment” (NLRA §8(d); 29 USC §158(d)), and makes an employer’s unilateral change in any of these categories an unfair labor practice (NLRA §8(a)(5); 29 USC §158(a)(5)). There are limits to the meaning of “terms and conditions of employment,” however, and the National Labor Relations Board and the Supreme Court have provided guidance as to when fundamental business decisions fall outside the scope of mandatory bargaining and within the exclusive prerogative of the employer. Even when no bargaining is required as to the decision itself, however, it may be required as to the effects of the decision. See §§18.63, 18.66.

§18.59 1. Total Plant Closings

In *Textile Workers Union v Darlington Mfg. Co.* (1965) 380 US 263, 272, 13 L Ed 2d 827, 85 S Ct 994, the Supreme Court ruled that an employer need not bargain with the union over any aspect of the employer’s decision to shut down a business entirely. Under the *Darlington* rule, such a plant-closing decision will

not constitute an unfair labor practice even if the plant closing is motivated by antiunion animus or a desire to retaliate against employees for the filing of unfair labor practice charges. *Contris Packing Co.* (1983) 268 NLRB 193.

Although the employer is not obliged to bargain over the decision itself, it must bargain over the effects of that decision. See §§18.63, 18.66.

NOTE ➤ If a collective bargaining agreement is already in place, a temporary plant shutdown will not relieve the employer of its duty to recognize and bargain with the union when the plant reopens, unless there has been a substantial change in the operations or character of the bargaining unit. See *El Torito-La Fiesta Restaurants, Inc. v NLRB* (9th Cir 1991) 929 F2d 490.

§18.60 2. Partial Plant Closings

The decision to partially shut down a business is not a mandatory bargaining subject, and so long as the decision is in fact economically motivated, it will not give rise to an unfair labor practice. *First Nat'l Maintenance Corp. v NLRB* (1981) 452 US 666, 69 L Ed 2d 318, 101 S Ct 2573. If the union can prove through direct or circumstantial evidence, however, that the partial closing was motivated by antiunion animus or intended as a retaliation against employees for filing unfair labor practice charges, the partial closing will constitute an unfair labor practice under NLRA §8(a)(3) or (4). 29 USC §158(a)(3)–(4). See *Textile Workers Union v Darlington Mfg. Co.* (1965) 380 US 263, 275, 13 L Ed 2d 827, 85 S Ct 994. Note that a decision to close down part of a plant and relocate workers to another plant may require decision bargaining. See §18.65.

Even though there is no duty to bargain over the decision to partially close a business, NLRA §8(a)(5) (29 USC §158(a)(5)) has been interpreted to require the employer to bargain over the effects of that decision, with the accompanying duty to disclose relevant information. *First Nat'l Maintenance Corp. v NLRB* (1981) 452 US 666, 681, 69 L Ed 2d 318, 101 S Ct 2573. See §§18.66–18.67.

§18.61 3. Plant Relocations

The National Labor Relations Board has fashioned a test for determining whether a particular employer's decision to relocate bargaining unit work is a mandatory subject of bargaining. Generally, an employer must bargain when the relocation is unaccompanied by a basic change in the nature of the employer's operation or when the union could and would offer concessions that meet or exceed the benefits of the relocation. *United Food & Commercial Workers Int'l Union v NLRB* (DC Cir 1993) 1 F3d 24, 29.

The burden is on the NLRB General Counsel to establish a prima facie case by showing that the decision to relocate was unaccompanied by a basic change in the nature of the employer's operations; thus, the decision is a mandatory subject of bargaining. The employer may rebut that claim by establishing that:

- The relocation involves a basic change in the nature of the employer's operation;
- The relocation involves a change in the scope and direction of the enterprise;

- The work at the new site varies significantly from the work at the old site; or
- The work performed at the old site is to be discontinued entirely and not moved to the new site.

As an alternative defense, the employer may show by a preponderance of the evidence that:

- Direct or indirect labor costs were not a factor in the decision; or
- Even if labor costs were a factor, the union could not have offered labor cost concessions that could have changed the relocation decision.

NOTE ➤ Once an employer and union have entered a collective bargaining agreement, there is a presumption that the union's majority status continues when the employer relocates if (1) the new plant is a short distance from the old, (2) the work at the new plant is substantially the same as at the old, and (3) the employees transferred from the old plant constitute a substantial percentage (approximately 40 percent or more) of the new workforce. See *NLRB v Rock Bottom Stores, Inc.* (2d Cir 1995) 51 F3d 366; *Harte & Co.* (1986) 278 NLRB 947; *Westwood Import Co. v NLRB* (9th Cir 1982) 681 F2d 664, 666.

When the employer moves only part of a bargaining unit to the new location, there is a rebuttable presumption that the new facility is a separate unit, and the employer need not recognize or bargain with the union unless a majority of the employees in the new unit are transferees from the original bargaining unit. *Gitano Group, Inc. & U.S. Outerwear, single & joint employers, dba Gitano Distrib. Ctr. & United Auto., Aerospace & Agr. Implement Workers, AFL-CIO* (1992) 308 NLRB 1172, 1175.

§18.62 4. Subcontracting to Nonunion Employees

If a partial plant closing or reduction in force results from the employer's decision to subcontract work previously held by unionized employees to a nonunion subcontractor, the employer must bargain over its decision, as well as the effects of its decision. *Textile Workers Union v Darlington Mfg. Co.* (1965) 380 US 263, 272 n16, 13 L Ed 2d 827, 85 S Ct 994; *Fibreboard Paper Prods. Corp. v NLRB* (1964) 379 US 203, 13 L Ed 2d 233, 85 S Ct 398.

§18.63 B. Subjects of Effects Bargaining

The duty to bargain over effects applies to decisions to partially close a plant and to relocate. This duty extends to any subject bearing on the employees' terms and conditions of employment, such as:

- Severance pay;
- Payments into a pension fund;
- Preferential hiring at other plants;
- Employee transfers with seniority rights;
- Reference letters;

- Health insurance and pension benefits;
- Retraining funds;
- Job security;
- Union representation; and
- Termination of the collective bargaining agreement.

Fraser & Johnston Co. v NLRB (9th Cir 1972) 469 F2d 1259, 1262; *Friedman's Express, Inc.* (1994) 315 NLRB 971; *Los Angeles Soap Co.* (1990) 300 NLRB 289, 295.

§18.64 C. The Duty to Bargain

The duty to bargain arises once the union has requested bargaining. If the union fails to request bargaining after it receives notice of the employer's intention to close a plant or relocate, it may waive its rights. See *Penntech Papers, Inc. v NLRB* (1st Cir 1983) 706 F2d 18; *National Car Rental Sys., Inc.* (1980) 252 NLRB 159; *U.S. Lingerie Corp.* (1968) 170 NLRB 750.

§18.65 1. Decision Bargaining

The parties must meet at reasonable times and negotiate in good faith (NLRA §8(d); 29 USC §158(d)), but if the parties reach an impasse, the employer can proceed to implement its decision. *Taft Broadcasting Co.* (1967) 163 NLRB 475.

The employer's obligation is to give the union a reasonable opportunity to bargain. It is advisable for the employer to give notice of the decision as soon as it becomes a serious possibility. A few weeks' notice of the decision will generally be considered sufficient, while a few days' notice will not, unless there is some legitimate business reason for the delay. See §§18.30–18.41 about giving notice.

§18.66 2. Effects Bargaining

The duty to engage in effects bargaining is satisfied if the parties negotiate “in a meaningful manner and at a meaningful time.” “Meaningful manner” means that the union must have an opportunity to discuss the full range of subjects bearing on the employees' terms and conditions of employment. *First Nat'l Maintenance Corp. v NLRB* (1981) 452 US 666, 682, 69 L Ed 2d 318, 101 S Ct 2573. The duty will not be satisfied by bargaining over “technical aspects” of work performed by employees who wind up the affairs of a facility or issues that are only of concern to a small number of the bargaining unit employees. *Friedman's Express, Inc.* (1994) 315 NLRB 971. Nor will it be satisfied if there is evidence of bad faith on the employer's part. See *NLRB v Triumph Curing Ctr.* (9th Cir 1978) 571 F2d 462, 471 (employer's negotiations were a “sham” when it moved equipment, employees, and supervisors to subcontractor's premises during negotiations and hired subcontractor after closing plant).

“Meaningful time” has been construed to mean that an employer must provide notice to the union and the opportunity to bargain before ceasing operations. *ARA Automotive Group* (1992) 306 NLRB 610, aff'd without written opinion

(5th Cir 1993) 990 F2d 1252; *Metro Tele-Tronics Corp. v NLRB* (1986) 279 NLRB 957, aff'd without written opinion (1987) 819 F2d 1130. Although an employer has no duty to bargain over its decision to close a portion of its business in certain situations, it is obligated to bargain about the effects of such a decision as early as possible. See, e.g., *Creasey Co.* (1984) 268 NLRB 1425, 1429 (3 days' notice was insufficient because union had insufficient opportunity to engage in meaningful discussions with employer).

The presence of "emergency circumstances" may excuse any advance notice requirement. See *Holly Peterson Co.* (1988) 290 NLRB PAGE 172899 (refusing to say as matter of law that no emergency existed when employer alleged concern that advance notice would have led to slowdown in production rate or sabotage to equipment or products); *Raskin Packing Co.* (1979) 246 NLRB 78 (recognizing emergency in discontinuance of line of credit); *M&M Transp. Co.* (1978) 239 NLRB 73 (finding emergency in lack of funds to continue operations). But see *Friedman's Express, Inc.* (1994) 315 NLRB 971 (insufficient evidence to support emergency circumstances exception when company allegedly failed to obtain additional capital and suffered abrupt decline in business leading to bankruptcy). It is the employer's burden to prove that emergency circumstances exist. *Friedman's Express, Inc.* (1994) 315 NLRB 971; *Reeves Bros.* (1992) 306 NLRB 610, 612 n15.

§18.67 D. The Duty of Disclosure

An employer's duty to bargain over the decision or the effects of the decision carries with it the duty to furnish relevant information requested by the union. See *NLRB v Truitt Mfg. Co.* (1956) 351 US 149, 100 L Ed 1027, 76 S Ct 753. The duty is reciprocal (see *Local 13, Detroit Newspaper Printing & Graphic Communications Union* (DC Cir 1979) 598 F2d 267), although the majority of cases involve union requests of employers.

The union typically requests a copy of relevant agreements or contracts (the employer may edit confidential information), information about accrued vacation time, the job titles and names of employees to be eliminated, and pay rates.

Refusal to supply information does not constitute an unfair labor practice per se, but it can be used as evidence of a refusal to bargain in good faith in violation of NLRA §8(a)(5) (29 USC §158(a)(5)). *NLRB v Truitt Mfg. Co.* (1956) 351 US 149, 153, 100 L Ed 1027, 76 S Ct 753.

§18.68 E. NLRB-Imposed Remedies

When an employer's refusal to bargain about its employment decision or the effects of that decision constitutes an unfair labor practice, the National Labor Relations Board at a minimum will order the parties to bargain to impasse or agreement. Back pay, benefits, and injunctive relief may also be ordered. See generally 29 USC §160.

§18.69 1. Decision Bargaining

When the employer has unlawfully refused to bargain about the decision to relocate, as well as in instances of discriminatory plant closings or transfers of work, the NLRB will generally order the employer to resume the status quo ante and to reinstate discharged employees. *Lear Siegler, Inc.* (1989) 295 NLRB 857.

The NLRB may decline to order such relief when the employer can show that it would be “unduly burdensome.” See, e.g., *Great Chinese Am. Sewing Co. v NLRB* (9th Cir 1978) 578 F2d 251, 256 (reopening order deemed unduly burdensome when plant had been dismantled, equipment had been sold piecemeal, reconstruction would be expensive, and trend in the industry was to subcontract work to low-cost foreign companies, so that order to reopen would put company at “a competitive disadvantage within its industry”).

Alternatively, the Board may order the employer to rehire the discharged employees at the relocated plant, even if that requires displacing existing employees. *Fraser & Johnston Co. v NLRB* (9th Cir 1972) 469 F2d 1259, 1266; *Darlington Mfg. Co. v NLRB* (4th Cir 1968) 397 F2d 760, 773. The Board also may order back pay from the date of termination until the parties bargain to an impasse or the employees secure substantially equivalent employment with the employer or elsewhere.

§18.70 2. Effects Bargaining

The remedies for refusing to bargain about the effects of a decision are generally less drastic than those ordered for failure to conduct decision bargaining. Pursuant to *Transmarine Navigation Corp.* (1968) 170 NLRB 389, the NLRB will order back pay from 5 days after its order until:

- The parties reach agreement or impasse; or
- The union fails to bargain in good faith.

See *Friedman’s Express, Inc.* (1994) 315 NLRB 971; *P.J. Hamill Transfer Co.* (1985) 277 NLRB 462. If the employer wrongfully refused to make vacation benefit payments and health, welfare, and pension fund contributions, it may be ordered to do so and to make employees whole for any losses suffered as a result of the failure to make payments, plus interest. *Friedman’s Express, Inc., supra.*

NOTE ➤ The NLRB has held that penalty payments assessed for violation of the Worker Adjustment and Retraining Notification Act may not be credited against payments required under the National Labor Relations Act as a result of an employer’s refusal to engage in effects bargaining. *Times Herald Printing Co.* (1994) 315 NLRB 700.

F. Third Party Liability

§18.71 1. Parent-Subsidiary

One company may be liable for the unfair labor practices of another if they possess the following characteristics that define an integrated enterprise:

- Interrelated operations;
- Common ownership or financial control;
- Common management; and
- Centralized control of labor relations.

See *Radio & Television Broadcast Technicians Local Union 1264 v Broadcast Serv. of Mobile, Inc.* (1965) 380 US 255, 13 L Ed 2d 789, 85 S Ct 876; *Great Chinese Am. Sewing Co. v NLRB* (9th Cir 1978) 578 F2d 251.

§18.72 2. Effect of Bankruptcy Proceedings

The National Labor Relations Board can enforce an order for failure to engage in effects bargaining against an employer's bankruptcy estate. In *NLRB v Continental Hagen Corp.* (9th Cir 1991) 932 F2d 828, the court determined that the NLRB falls within the governmental police or regulatory unit exception to the automatic stay provisions of the Bankruptcy Code.

§18.73 G. Statute of Limitations

Unfair labor practices are subject to a 6-month statute of limitations. NLRA §10(b); 29 USC §160(b). When there has been fraudulent concealment of material facts, however, the limitations period begins to run from the time the plaintiff knew or should have known of the concealed facts. *NLRB v O'Neill* (9th Cir 1992) 965 F2d 1522, 1526.

§18.74 H. Preemption of State Law Claims by LMRA

State law contract claims are generally preempted under Labor Management Relations Act (LMRA) §301 (29 USC §185). See *Allis-Chalmers Corp. v Lueck* (1985) 471 US 202, 218, 85 L Ed 2d 206, 105 S Ct 1904; *Harris v Alumax Mill Prods., Inc.* (9th Cir 1990) 897 F2d 400.

State law tort claims may be preempted, depending on the circumstances of the case. Generally, if the claim requires interpretation of the collective bargaining agreement, it is preempted under LMRA §301. See *Lingle v Norge Div. of Magic Chef, Inc.* (1988) 486 US 399, 100 L Ed 2d 410, 108 S Ct 1877. Even when a state law tort claim does not require interpretation of a collective bargaining agreement, it may fall under the doctrine established in *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v Garmon* (1959) 359 US 236, 245, 3 L Ed

2d 775, 79 S Ct 773. *Garmon* held that, with certain statutory exceptions, activities “arguably” protected or prohibited by the National Labor Relations Act are within the exclusive jurisdiction of the NLRB.

A union’s claim that an employer fraudulently induced it to sign a collective bargaining agreement by assuring employees that their jobs were secure may be brought as a federal claim under LMRA §301. See *International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers v American Delivery Serv. Co.* (9th Cir 1995) 50 F3d 770, 773; *Milne Employees Ass’n v Sun Carriers, Inc.* (9th Cir 1992) 960 F2d 1401, 1407. If alleged under state law, however, the claim generally will be preempted under *Garmon* because the employer’s fraud or misrepresentation constitutes bad faith bargaining in violation of NLRA §8(a)(5) (29 USC §158(a)(5)).

§18.75 VIII. Bankruptcy Issues

Financial difficulties are sometimes the reason for a reduction in force or the closing of a plant. Consequently, bankruptcy issues must be addressed. In all but the most routine matters, employers should be advised to consult a specialist in bankruptcy law. Any action against the employer outside the bankruptcy case will almost always be prohibited by the “automatic stay” of 11 USC §362. Deadlines for taking action within the bankruptcy case—or losing rights irretrievably—can arise *very quickly after the filing date*, and applicable dates should be promptly and thoroughly reviewed immediately on learning of a bankruptcy filing. Deadlines are uniform nationwide for some matters, but vary by bankruptcy district on other matters. The following discussion applies to bankruptcy cases filed within the territory of the Ninth Circuit Court of Appeals; in some instances case law in other circuits would give different results.

A. Employer Bankruptcy

§18.76 1. Priority for Certain Wages and Benefits Claims

Among unsecured claims against the employer’s bankruptcy estate, wages and benefits relating to work performed *after* the date of the bankruptcy filing, accrued but unpaid, are entitled to *second* priority as “administrative expenses.” 11 USC §§503(b), 507(a)(2). (These amounts are not subject to the cap described below for pre-filing employee claims.)

Wages, salaries, and commissions earned but not paid within the 90 days *before* the date of the employer’s bankruptcy filing or the date on which employer ceased doing business, whichever is earlier, are given *fourth* priority behind “involuntary gap” claims (see 11 USC §§502(f)), but are capped at a maximum of \$10,000 per person. Included in this category are accrued vacation pay, sick pay, and severance pay. 11 USC §507(a)(4).

If an employee’s termination occurs after performing some work subsequent to the bankruptcy filing, accrued vacation pay will be allocated between the post- and pre-filing periods (and thus to more and less favorable priority treatment). *Straus-Duparquet, Inc. v Local Union No. 3, Int’l Bhd. of Elec. Workers (In re Straus-*

Duparquet, Inc.) (2d Cir 1967) 386 F2d 649 (superseded by Bankruptcy Reform Act of 1978). Severance pay will similarly be allocated between post- and pre-filing, if based on length of service. If severance pay is paid not according to length of service, but in lieu of notice of termination, it is considered an administrative expense under 11 USC §507(a)(2). *Lines v System Bd. of Adjustment No. 94, Bhd. of Railway, Airline & Steamship Clerks (In re Health Maintenance Found.)* (9th Cir 1982) 680 F2d 619. If severance pay is paid on some basis remote from either of these two grounds, bankruptcy courts will evaluate it on a case-by-case basis. *Dullanty v Selectors, Inc. (In re Selectors, Inc.)* (BAP 9th Cir 1988) 85 BR 843. Note that a collective bargaining agreement may be relevant to the treatment of vacation and severance benefits. See 11 USC §1113; *Dullanty v Selectors, Inc., supra*.

NOTE➤ There is a split of authority on this matter. In adopting the view that severance pay should be divided into two types—pay at termination in lieu of notice and pay at termination based on length of service—the Ninth Circuit follows the First and Third Circuits. This view rejects the Second Circuit’s view that both types of severance pay constitute administrative expenses. *Dullanty v Selectors, Inc. (In re Selectors, Inc.)* (BAP 9th Cir 1988) 85 BR 843. See also *In re Pacific Far East Line, Inc.* (9th Cir 1983) 713 F2d 476.

§18.77 2. Employee Benefit Plan Contributions

Employer contributions to employee benefit plans, due but unpaid as of the bankruptcy filing date, are a *fourth* priority claim. 11 USC §507(a)(4). The Bankruptcy Code caps those claims at \$10,000 for each individual or corporation. See 11 USC §507(a)(5). This priority does not extend to a carrier’s claims for unpaid workers’ compensation premiums. *Howard Delivery Serv. v Zurich Am. Ins. Co.* (2006) 547 US 651, 165 L Ed 2d 110, 125, 126 S Ct 2105, 2116.

§18.78 3. Retiree Benefits

Medical and death benefit payments to existing retirees must continue to be paid in an employer’s Chapter 11 bankruptcy case unless and until the bankruptcy court determines that a modification of those benefits is necessary to permit the employer’s reorganization. 11 USC §1114. A careful review procedure is provided by the statute, although the ultimate question is whether modification or rejection of the benefits plan is an economic necessity for the troubled employer. The employer cannot obtain court approval for a Chapter 11 plan of reorganization unless the plan provides for the continuation of all retiree benefits at the pre-filing level or at a level approved by the Bankruptcy Court under 11 USC §1114. 11 USC §1129(a)(13).

§18.79 4. Employee Contract Termination Claims

The Bankruptcy Code limits the amount recoverable by an employee on a claim based on termination of his or her employment contract to 1 year’s compensation under the contract (without acceleration), calculated from the

date the bankruptcy petition was filed or the date the employee terminated his or her performance under the contract, whichever was earlier, plus any unpaid compensation due on that date. 11 USC §502(b)(7).

§18.80 5. Collective Bargaining Agreements

The terms of a pre-filing collective bargaining agreement will continue to apply after the employer's Chapter 11 bankruptcy filing (but not in a Chapter 7 liquidation), unless and until the bankruptcy court approves either a modification of the terms of the agreement or its rejection. 11 USC §1113. The statute provides a careful review procedure, the ultimate question being whether modification or rejection of the agreement is an economic necessity for the troubled employer.

§18.81 6. Non-NLRA Employment Agreements

Employment agreements not subject to the National Labor Relations Act may not be performed by an employer after a bankruptcy filing. Such agreements are subject to rejection as executory contracts under 11 USC §365; damages for their breach will be treated according to the rules for wage and benefit claims. See §18.76.

§18.82 7. Labor Union Standing and Plan of Reorganization

In an employer's Chapter 11 bankruptcy case (but not in a liquidation under Chapter 7), a labor union or association representing the employees has the right to be heard on a plan of reorganization affecting the employees' interests, although the union has no right of appeal. Fed R Bankr P 2018(d). A union might have standing in its own right, however, if it has a monetary claim against the employer.

§18.83 8. Nondischargeable Claims

If an employer is an individual, rather than a corporation or partnership, certain types of claims held by employees may be nondischargeable in the employer's bankruptcy. 11 USC §523(c)(1). For example, a claim against an individual employer for wrongful termination can be held nondischargeable as a willful, malicious injury. 11 USC §523(a)(6).

§18.84 B. Employee Bankruptcy

A bankruptcy filing by an employee can raise some special issues. The "automatic stay" of 11 USC §362 will effectively prohibit any legal action to collect a debt or claim from the employee. Further, an employee may not be terminated by a public or private employer solely because of the employee's bankruptcy filing. 11 USC §525. Section 525 does not, however, prevent the employer from terminating an employee who has merely indicated his or her intent to file for bankruptcy. *Majewski v St. Rose Dominican Hosp. (In re Majewski)* (9th Cir 2002) 310 F3d 653.

In addition, the automatic stay does not prohibit terminating an employee's employment for other valid reasons, unless there is an employment contract. If there is such a contract, the employer should obtain relief from the stay before attempting to terminate it, even if the contract has an "at-will" termination clause. See *Computer Communications, Inc. v Codex (In re Computer Communications, Inc.)* (9th Cir 1987) 824 F2d 725.

The automatic stay also affects an employer's ability to enforce a bankrupt employee's pre-filing obligations under contractual agreements not to disclose intellectual property. Injunctive relief against disclosure will still be available, but it must be sought from the bankruptcy court and will be limited to prospective relief rather than damages.

If an employer has claims against its employee that are tort based in nature (*e.g.*, misappropriation of trade secrets), those claims may be nondischargeable in the employee's bankruptcy. 11 USC §523(c)(1).

WARNING ➤ A complaint to determine the dischargeability of a debt must be filed no later than 60 days after the first date set for the meeting of creditors, unless the time is extended by the bankruptcy court. Fed R Bankr P 4007(c).

www.bakernet.com

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, California 94304-0309, US
Tel: +1 650 856 2400
Fax: +1 650 856 9299

Baker & McKenzie International is a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a “partner” means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an “office” means an office of any such law firm.

©2009 Baker & McKenzie
All rights reserved.