

# **DOE CONTRACTOR ATTORNEYS' ASSOCIATION**

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## **Ten Tips For Conducting RIFs**

**Edward G. Phillips, Esq.**

**Kramer Rayson LLP**

**Phone: (865) 525-5134**

**email: [ephillips@kramer-rayson.com](mailto:ephillips@kramer-rayson.com)**

**website: [kramer-rayson.com](http://kramer-rayson.com)**

# Tip No. 1: Charge special management committee with planning and implementing RIF.

- Include diverse group of senior managers, human resources manager(s) and counsel for legal advice.
- Have committee determine RIF methods (e.g., hiring freeze, VRIF, early retirement enhancements, etc., followed by an IRIF).
- Develop written RIF policy or guidelines; make sure it is **followed**.
- RIF communications and meeting notes should be from one executive on the committee after review by counsel.

## Tip 2: Establish Overall Communication Strategy

- Decide how early to announce possible layoffs and exit incentive programs.
  - Consider early communication that RIF **may occur** to combat rumors.
  - Let the information come from company not rumor mill.
  - Employees who feel they have not been provided accurate information about a RIF often turn to lawyers for help.

## Tip 3: Disparate impact claims loom large, requiring careful planning

- Smith v. City of Jackson, 544 U.S. 228 (2005) (ADEA disparate impact claim viable but ER can rely on RFOA and Wards Cove paradigm applies).
- Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (when employer combines objective **and** subjective criteria, EE must “isolate and identify the specific offending employment practice.”)
- If ER uses solely subjective criteria, EE can analyze decision process as a whole. Id.

## Tip 3: Disparate impact claims loom large, requiring careful planning (con't)

- Critical unanswered question: is RFOA part of ER's burden to articulate a non-discriminatory reason **or** is it an affirmative defense.
- Meacham v. Knolls Atomic Power Laboratory, 2006 WL 2338174 (2<sup>nd</sup> Cir. Aug. 14, 2006), petition for cert. filed May 9, 2007 (burden is on plaintiff to prove employer's selection criteria/process was **unreasonable**; allowing managers to determine critical skills/flexibility was reasonable.)

## Tip 3: Disparate impact claims loom large, requiring careful planning (con't)

- Meacham petition for certiorari raises two issues:
  1. Whether plaintiff in ADEA disparate impact case has the burden of persuasion on the “reasonable factors other than age” defense as Second Circuit held (in conflict with EEOC and other circuit courts.)
  2. Whether ER’s practice of conferring discretionary authority on individual managers for layoff selections constituted a “reasonable factor other than age.”

## Tip 4: Make Selection Criteria as Objective as Possible

- Totally subjective process allows bottom line statistical analysis.
- Using prior performance appraisal scores held to be “objective.” Meacham, supra.
- Giving credit for years of service, time in position, relevant education are “objective.”

## Tip 4: Make Selection Criteria as Objective as Possible (con't)

- Carefully define critical skills, transferability or similar traits to reduce subjectivity.
- Have prepared worksheet (layoff comparison form) that must be used to compare selected RIF candidates with peers against the criteria.
- Require detailed justifications on the paperwork where individuals to be laid off are in protected categories.



## Tip 5: Select the Correct Decisionmakers

- Department or division managers usually make the best decisionmakers (and witnesses!)
- Recommendation from department manager to division manager makes both decisionmakers.
- Avoid obtaining recommendations from front line supervisors.
  - They are usually the ones alleged to have made age, race or gender-biased statements.

## Tip 6: Train the Decisionmakers

- In Meacham a factor supporting reasonableness was that managers were trained to understand the selection criteria definitions and the process for completing layoff forms.
- Train decisionmakers on avoidance of race, gender, or age discrimination and document training.

## Tip 7: Use RIF Review Board

- Be sure Board is **diverse** with strong leader.
- Include management, HR, AA/EEO and legal counsel.
- Board must critically review and demand detailed justification for all aspects (e.g. comparison group, performance, skills) of any decision that results in the layoff of protected employees; no rubber stamp.
- Board should review selections for **disparate impact** as well as **disparate treatment**.

## Tip 8: Get Statistics Right

- You **must** conduct adverse impact statistics on race, gender and **age**.
- Do not use untrained HR representatives.
- Strongly consider **expert statistician** to identify proper pools and run various tests including multiple regression analyses.
- Outside counsel or law department should hire statistician to maintain attorney-client and work product privileges.

## Tip 8: Get Statistics Right (con't)

- Use adverse impact as “red flag” requiring closer scrutiny of certain selections and perhaps the process itself.
- If RIF selections cannot withstand close scrutiny then they should be revised.
- Purpose is not to remedy statistical outcome but to correct an erroneous choice(s).
- Severe disparities at plant-wide level call for review of entire process.

## Tip 9: Get Voluntary Separation Programs Right

- Using voluntary separation benefits, especially pension enhancement or bridging years of service, can significantly reduce ADEA risk.
- When ER starts giving “serious consideration” to implementing any enhanced severance program, ER has a fiduciary duty to avoid any misstatements to EEs about the potential program. Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154, 1164 (6th Cir. 1988).

# The Golden Rule

- An employer who makes any statement about future benefits (such as severance or retiree medical benefits), whether in response to questions or on the employer's own initiative, will be held liable for any inaccurate information:
  - (a) when the statement is materially misleading when made; or
  - (b) when the statement is true when made but turns out to be inaccurate because of later decisions *and* the employer fails to timely provide participants with the correct information.

## Tip 10: Get the Layoff Notification Right

- Train managers on how to conduct the RIF notification meetings.
- Two persons present, decisionmaker and HR - - preferably not immediate supervisor.
- Impress on employee the finality of the decision (avoids equitable tolling).
- Have separate individual benefit meetings conducted by compensation or HR and separate outplacement meetings which can be in groups.