Reductions-in-Force and Plant Closures

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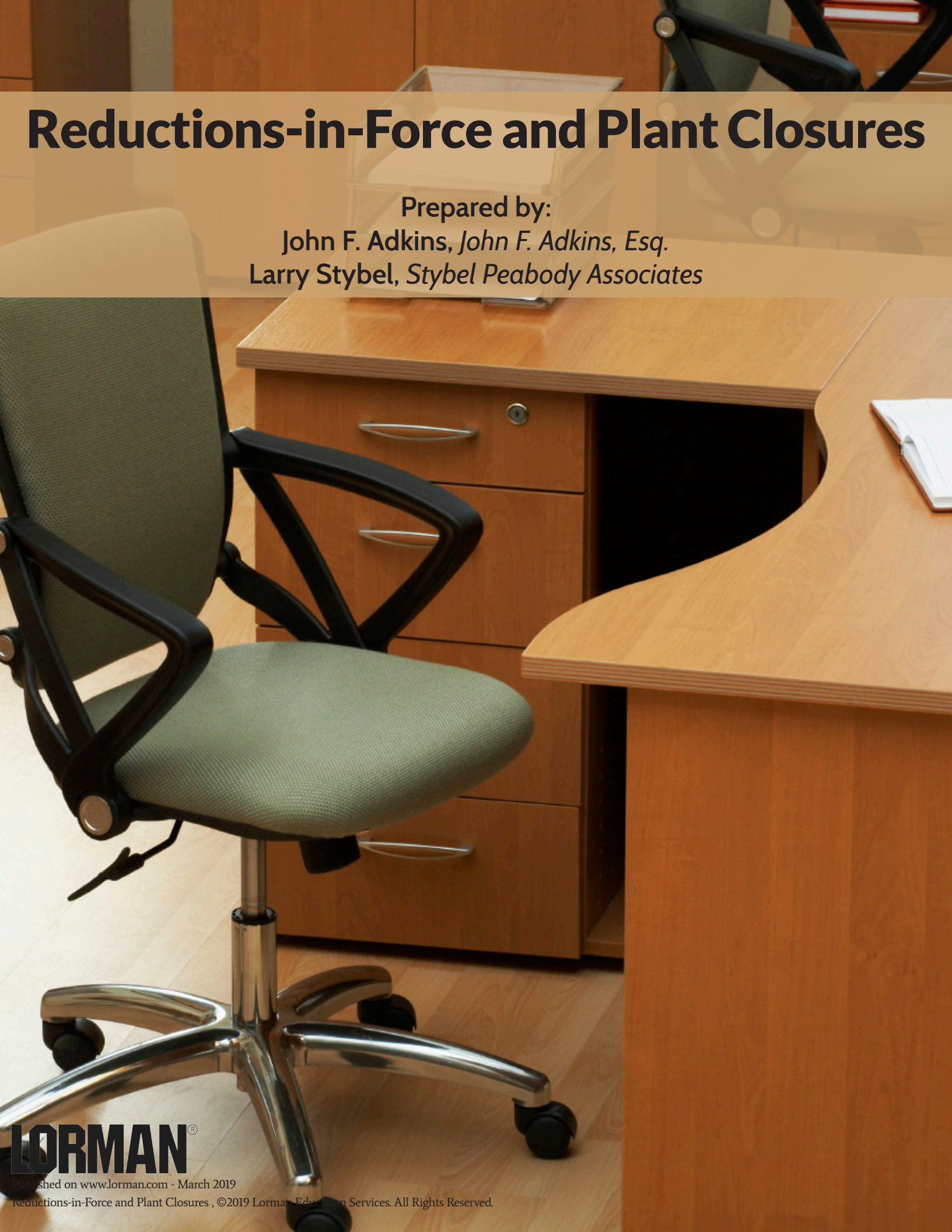

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Reductions-in-Force and Plant Closures

Reductions-in-force ("RIFs") and plant closures raise numerous issues under federal and state employment laws, including but not limited to those prohibiting discrimination on the basis of age, race, national origin, religion and other prohibited factors[1]; statutes requiring employee notice of RIFs and plant closures[2]; benefits laws covering various employee benefits[3]; and statutes protecting the rights of reservists called for military duty[4].

Employers must carefully plan each restructuring to minimize the potential for negative publicity, expensive and time-consuming litigation, and poor morale among remaining employees. The following guidelines identify considerations that should be taken into account when implementing a RIF or plant closure. This list is not exhaustive, as the plan for each RIF or plant closure will vary depending on the particular facts and circumstances.

- **Articulate sound business reasons for the restructuring decision and communicate those consistently to the workforce.** Identify and clearly articulate what the restructuring is intended to accomplish. Carefully develop well-defined business justifications for the decision, including the size of the RIF or plant closure.

- **Review collective bargaining obligations.** If the affected workforce is covered by a collective bargaining agreement, consider whether the restructuring will trigger decision bargaining or effects bargaining obligations. Review union contracts for management rights clauses and for other provisions regarding plant closures, layoffs, and subcontracting.

- **Document business needs and goals.** Prepare internal memoranda that articulate the goals to be achieved through the restructuring and the relationship of those goals to business needs, including the projected savings and the size of the RIF necessary to achieve those goals.

- **Consider alternatives.** Evaluate whether alternatives such as hiring freezes, elimination of outsourced work, wage and/or benefit reductions, reduced workweeks, unpaid leave, periodic temporary shut downs, furloughs, voluntary severance programs, or early retirement

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[1] These statutes include the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq*. (age discrimination); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. (race, sex, religion and national origin discrimination); Section 1981 of the Civil Rights Act of 1864, 42 U.S.C. §1981 (race and national origin discrimination); the Americans With Disabilities Act, 29 U.S.C.§706 (disabilities discrimination), and analogous state and local statutes.

[2] The Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2101 *et seq*., and analogous state statutes.

[3] The Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq*. (employee benefits), and state statutes requiring payment of severance and other benefits in reduction-in-force and/or plant closing situations.

[4] The Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. §4301 *et seq*. and parallel state statutes.

incentives would achieve the business needs and goals without a RIF or plant closure. Document the results of this analysis.

- **Identify expendable job functions.** This is a process of elimination. First, identify those job functions necessary to enable the company to continue to operate following the restructuring. Determine which positions must be retained in order to assure that these functions can be accomplished. Review the functions to determine whether any current positions can be efficiently consolidated into single job classifications or otherwise restructured to more efficiently accomplish these functions. The remaining positions are those that can be eliminated. Document this analysis.

- **Establish well-defined selection criteria that are most important to the performance of future objectives.** While clearly reserving management discretion in making ultimate selection decisions, establish a set of well-defined, preferably objective, criteria for use in ranking and selecting employees. The more that objective criteria can be used in making layoff decisions, the more effective the employer will be in defending against legal challenges. Examples of objective criteria include: quantifiable performance standards; quantifiable productivity standards; skill and flexibility; disciplinary records; attendance; and length of service. These criteria should be in writing.

- **Rank employees using a standardized process.** Train managers in using the selection criteria and rank all employees in accordance with their relative value to the performance of the organization's remaining work functions after the restructuring. Document the selection process with written instructions to managers and standardized forms for them to document their selections.

- **Review the selection process for nondiscrimination.** Review the selection decisions to confirm that they comport with the ranking criteria and are consistent with personnel records. With the assistance of counsel, conduct an adverse impact analysis to determine if there is any statistically significant adverse impact on employees in statutorily protected categories (e.g., race, sex, age, national origin). If so, review the bases for the selections in the affected protected group(s) again to ensure that decisions are defensible and modify the decisions if they are not.

- **Communicate effectively with employees.** Limit the disclosure of confidential information to employees and assure consistent communication of the company's message. Communicate decisions by memoranda and by employee meetings with all employees. Be forthright. Up-front, consistent, and credible communication with employees is critical to a successful downsizing.

- **Decide on terms of severance.** Determine whether to offer employees severance pay or benefits, or other consideration following the RIF or plant closure. Many companies choose to offer an additional payment to ease the hardship of a layoff, often in exchange for a release. Companies should check relevant union contracts, employee policies, and state laws to determine if there is any legal obligation to provide severance pay or benefits.

- **Obtain valid waivers.** Obtain waivers which, in exchange for additional consideration, release the employer from all claims. Waivers must comply with the notice and disclosure requirements of the Older Workers Benefit Protection Act ("OWBPA") and any similar state law requirements. In addition, recent Equal Employment Opportunity Commission ("EEOC") regulations restrict an employer's ability to include so-called "tender-back" provisions and covenants not to sue in waivers of age discrimination claims.

- **Review coverage and notice requirements under the WARN Act and state law.** Layoffs of 50 or more people may trigger Worker Adjustment and Retaining and Notification Act (WARN) obligations, and require 60 days' advance notice to employees and certain governmental agencies. Where the WARN Act does not apply, companies should weigh affected employees' needs for notice against potential disruption to work operations in determining how much notice to give employees. Check for applicable state laws as well.

- **Review leave considerations.** The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits an employer from discriminating or taking any adverse action against an employee based on military service. As a result, an employer should proceed with caution before laying off an employee who is on military leave, because the employer will be required to show that the decision would have been taken in the absence of military service. Moreover, USERRA restricts an employer's ability to terminate an employee who has been on leave for reasons other than "cause," for a certain period following the employee's return to work. Accordingly, employers who are considering a RIF of an employee who has returned from military service must carefully assess the selection criteria used and should seek advice of counsel in light of the scant legal precedent available.

  Other statutes prohibit retaliation against employees who have engaged in protected acts, such as taking Family or Medical leave, whistleblowing, protesting discrimination, or asserting rights under wage and hour laws. Again, a proposed RIF of such employees should be carefully scrutinized and reviewed with counsel.

- **Consider the human factor.** If a RIF decision is challenged, it will be reviewed by third parties (e.g., compliance officers at enforcement agencies, arbitrators, judges, juries) who will empathize with the employee and will punish the employer for being inconsiderate of the employee's situation. Showing consideration is not only the right thing to do - it's the smart thing to do.

The process of reducing a workforce is never easy, and becomes particularly difficult when conducted in hard economic times. However, companies can ensure that the process goes more smoothly and potential legal pitfalls are avoided by taking the time to consider the legal and practical implications of the decision to implement a RIF or plant closure.