Termination Best Practices

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Discharging an employee is never an easy or risk-free process. However, when an employer believes it is in the employer's best interest to discharge an employee, there are certain legal and practical "best practices" that will assist in reducing the level of risk involved in termination decisions.

A. Legal Considerations

1. Worker Adjustment Retraining Notification Act

If the employer is discharging a group of employees or conducting a plant closing, the Worker Adjustment Retraining and Notification Act ("WARN Act") may be implicated. The WARN Act requires employers to provide written notice at least 60 calendar days in advance of covered plant closings and mass layoffs, as those terms are defined in the Act. An employer's notice to the required government agencies assures that assistance can be provided to affected workers, their families, and the appropriate communities through the State Rapid Response Dislocated Worker Unit. The advance notice allows workers and their families transition time to seek alternative jobs or enter skills training programs.

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[1] Nothing in this paper is intended to substitute for professional legal advice about specific matters. Minor differences in facts or legal characterizations can have a significant impact on your potential or actual liability. You should consult your labor and employment law counsel to resolve any questions you may have about your compliance with the statutes, regulations and caselaw discussed in this paper.

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Upon receipt of a WARN notice, the State Rapid Response Dislocated Worker Unit coordinates with the employer to provide on-site information to the workers and employers about employment and retraining services that are designed to help participants find new jobs.

a. The Basics

1. When WARN Notice is Required

A WARN notice generally is required when a business with more than 100 full-time workers (not counting workers who have less than 6 months on the job and workers who work fewer than 20 hours per week) is laying off at least 50 people at a single site of employment, or employs 100 or more workers who work at least a combined 4,000 hours per week, and is a private for-profit business, private non-profit organization, or quasi-public entity separately organized from regular government. *See* 20 CFR §§ 639.3, 639.4.

Affected employees are those who may expect to experience an employment loss. They may be hourly and salaried workers, including managerial and supervisory employees and non-strikers. *See* 20 CFR §§ 639.3. Affected employees include:

- Employees who are terminated or laid off for more than six months or who have their hours reduced more than 50% in any six month period as a result of the plant closing or mass layoff;

- Employees who may reasonably be expected to experience an employment loss as a result of a proposed plant closing or mass layoff. If the employer has a seniority system that involves bumping rights, the employer should use its best efforts to give notice to the workers who will actually lose their jobs as a result of the system. If that is not possible, then an employer must give notice to the incumbent in the position being eliminated;

- Workers who are on temporary layoff but have a reasonable expectation of recall; this includes workers on workers' compensation, medical, maternity, or other leave; and

- Part-time workers. These workers do not count when determining whether there has been a plant closing or mass layoff but they are entitled to receive WARN notice if there is one.

See 20 CFR §639.3. The following employees generally are not protected under WARN:

- Strikers, or workers who have been locked out in a labor dispute;

- Workers working on temporary projects or facilities of the business who clearly understand the temporary nature of the work when hired;

- Business partners, consultants, or contract employees assigned to the business but who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed; and

- Regular federal, state, and local government employees.

See 20 CFR § 639.5.

Employees not counted under WARN for determining whether a layoff or plant closing falls within the WARN requirements include:

- Part-time workers;

- Workers who retire, resign, or are terminated for cause;

- Workers who are offered a transfer to another site of employment within a reasonable commuting distance if: the closing or layoff is a result of a relocation or consolidation of all or part of the employer's business; and the transfer involves no more than a six month break in employment

- Workers who are offered a transferred to another site of employment outside of a reasonable commuting distance if: the closing or layoff is a result of a relocation or consolidation of all or part of the employer's business; the transfer involves no more than a 6-month break in

> employment; and the worker accepts the offer within 30 days of the offer or the closing or layoff, whichever is later.

See 20 CFR § 639.3.

2. Circumstances that Trigger WARN

WARN is triggered when a covered employer closes a facility or discontinues an operating unit permanently or temporarily, affecting at least 50 employees, not counting part-time workers, at a single site of employment. *See* 20 CFR §§ 639.3. A plant closing also occurs when an employer closes an operating unit that has fewer than 50 workers but that closing also involves the layoff of enough other workers to make the total number of layoffs 50 or more. *See* 20 CFR §§ 639.3, 639.5.

A covered employer triggers WARN when it lays off more than 500 workers (not counting part-time workers) at a single site of employment during a 30-day period; or lays off 50-499 workers (not counting part-time workers) and these layoffs constitute 33% of the employer's total active workforce (not counting part-time workers at a single site of employment. *See* 20 CFR § 639.3.

A covered employer implicates WARN also when it announces a temporary layoff of less than 6 months that meets either of the two criteria above and then decides to extend the layoff for more than 6 months. *See* 20 CFR § 639.4. If the extension occurs for reasons that were not reasonably foreseeable at the time the layoff was originally announced, notice need only be given when the need for the extension becomes known. Any other case is treated as if notice was required for the original layoff. *Id*.

A covered employer may also trigger WARN when it reduces the hours of work for 50 or more workers by more than 50% for each month in any 6-month period. *See* 20

CFR § 639.3. Thus, a plant closing or mass layoff need not be permanent to trigger WARN.

3. Circumstances That Do Not Trigger WARN

WARN is not triggered when a covered employer:

- Closes a temporary facility or completes a temporary project, and the employees were hired with the clear understanding that their employment would end with the closing of the facility or the completion of the project; or

- Closes a facility or operating unit due to a strike or lockout and the closing is not intended to evade the purposes of the WARN Act.

See 20 CFR § 639.5. WARN is also not triggered when the following thresholds for coverage are not met:

- If a plant closing or mass layoff results in fewer than 50 people losing their jobs at a single site of employment;

- If 50-499 workers lose their jobs and that number is less than 33% of the employer's total active workforce at a single site;

- If a layoff is for 6 months or less; or

- If work hour are not reduced more than 50% in each month of any 6-month period.

4. Calculating The Timeframe To Determine When WARN Notice Is Required

WARN looks at the employment losses that occur over a 30-day period. *See* 20 CFR § 639.5. For example, if an employer closes a plant which employs 50 workers and lays off 40 workers immediately, and then lays off the remaining 10 workers 25 days later, that is a covered plant closing.

WARN also looks at the employment losses that occur over a 90-day period. *See* 20 CFR § 639.5. An employer is required to give advance notice if it has a series of small terminations or layoffs, none of which individually would be covered under WARN but which add up to numbers that would require WARN notice. *Id.* An employer is not required to give notice if it can show that the individual events occurred as a result of separate and distinct actions and causes and are not an attempt to evade WARN. *Id.*

5. Exceptions To The 60-Day Notice

There are three exceptions to the full 60-day notice requirement. *See* 20 CFR § 639.9. However, notice must be provided as soon as is practicable even when these exceptions apply, and the employer must provide a statement of the reason for reducing the notice requirement in addition to fulfilling other notice information requirements. The exceptions are:

- Faltering company. When, before a plant closing, a company is actively seeking capital or business and reasonably in good faith believes that advance notice would preclude its ability to obtain such capital or business, and this new capital or business would allow the employer to avoid or postpone a shutdown for a reasonable period. The faltering company exception does not apply to mass layoffs and is narrowly construed;

- Unforeseeable business circumstances. When the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required (*i.e.*, a business circumstance that is caused by

some sudden, dramatic, and unexpected action or conditions outside the employer's control, like the unexpected cancellation of a major order); or

- Natural disaster. When a plant closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, drought, storm, tidal wave, or similar effects of nature. In this case, notice may be given after the event.

6. Contents of the Notice when Employees are Not Represented

Notice to individual employees must be written in clear and specific language that employees can readily understand and must contain at a minimum the following requirements:

- A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
- The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;
- An indication as to whether or not bumping rights exist; and
- The name and telephone number of a company official to contact for further information. The notice may include additional information useful to the employee such as available dislocated worker assistance and, if the planned action is expected to be temporary, the estimated duration, if known.

7. Contents of the Notice to the Dislocated Worker Unit And The Local Chief elected Official

Advance notice should be given to the State Rapid Response Dislocated Worker Unit as well as to the chief elected official of the local government where the closing or mass layoff is to occur. *See* 20 CFR §§ 639.6. If there is more than one such unit, the tiebreaker is the local government to which the employer paid the most taxes in the

preceding year. *See* 20 CFR § 639.3. However, if many affected employees live in nearby local government jurisdictions, it is also helpful to provide notice to those additional local governments so that coordinated planning of services for those employees to be laid off may begin quickly.

Notice to the State Rapid Response Dislocated Worker Unit and the local chief elected official must contain at a minimum:

- The name and address where the mass layoff or plant closing is to occur, along with the name and telephone number of a company contact person who can provide additional information;
- An explanation of whether the employment loss will be temporary or permanent, and whether the entire plant is being closed;
- The expected date of the first job losses, along with a schedule of any further employment reductions
- The job titles of positions that will be affected and the name of affected employees in each job category;
- A statement of bumping rights, if any exist; and
- The name of each union/employee representative and the name and address of the chief elected official of each union.

See 20 CFR § 639.7. The WARN regulations also allow employers to provide alternative notice to the State Rapid Response Dislocated Worker Unit and the chief local elected official. The alternative form must be a written notice that provides the following information;

- The name and address of the employment site where the plant closing or mass layoff will occur;
- The name and telephone number of a company official to contact for further information;

- The expected date of separation; and
- The number of affected employees.

Id. Employers who choose to provide the alternative form of notice must keep accessible all other information outlined above and provide it to the State Rapid Response Dislocated Worker Unit and local government upon request. *Id.* Any failure to provide this additional information will be deemed a failure to give required WARN notice.

8. What The Notice To The Union Representative May Contain

Notice to the bargaining agent/chief elected officer of each affected union or local union official must contain at a minimum the following information:

- The name and address where the mass layoff or plant closing is to occur, along with the name and telephone number of a company contact person who can provide additional information;
- A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
- The expected date of the first separation and the anticipated schedule for making separations; and
- The job titles of positions to be affected and the name of affected employees in each job classification

See 20 CFR § 639.7. The notice may include additional information useful to the employees such as available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

9. Dates of Termination/Layoff

The WARN regulations recognize that it may not always be possible to identify, 60 days in advance, the exact date a termination or layoff will occur. WARN notice may

identify a two-week (14-day) period during which terminations/layoffs will take place. *See* 20 CFR § 639.7.

10. Extension of Notice

Additional notice is required when the date or schedule of dates of a planned plant closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice as follows:

- If the employment action is postponed for less than 60 days, additional notice should be given as soon as possible and should include reference to the earlier notice, the new action date, and the reason for the postponement. The notice need not be formal but should be given in a manner that will provide the information to all affected employees; or
- If the postponement is for 60 days or more, a new notice is required.

See 20 CFR § 639.10. Routine periodic notice, given whether or not a plant closing or mass layoff is impending and with the intent to evade specific notice as required by WARN, is not acceptable. *Id.*

11. Serving Notice

An employer may use any reasonable method of delivery designed to ensure receipt of the written notice at least 60 days before separation. However, preprinted notices regularly included in each employee's paycheck or pay envelope and verbal notices do not meet the WARN requirements.

12. Sale of a Business

When all or part of a business is sold, even if it is an asset sale, WARN applies. If a covered plant closing or mass layoff occurs, the employer – the seller or buyer – responsible for giving notice depends on when the event occurs. *See* 20 CFR § 639.4.

The seller must give notice for a covered plant closing or mass layoff that occurs before the sale becomes effective. *Id.* The buyer must give notice for a covered plant closing or mass layoff that occurs after the sale becomes effective. *Id.* Employees of the seller automatically become employees of the buyer for purposes of WARN. That means that even though there is a technical termination of employment when employees stop working for the seller and start working for the buyer, the technical termination does not trigger WARN.

13. Penalties for Violating WARN

An employer who violates WARN is liable to each affected employee for an amount equal to backpay and benefits for the period of the violation, up to 60 days. This liability may be reduced by any wages the employer pays over the notice period. WARN liability may also be reduced by any voluntary and unconditional payment not required by a legal obligation.

An employer who fails to provide notice as required to a unit of local government is subject to a civil penalty not to exceed $500 for each day of violation. The penalty may be avoided if the employer satisfies its liability to each affected employee within three weeks after the closing. In any suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

b. Best Practices

There is no way around it – WARN is a collection of technical rules whose application is highly dependent on the facts of every case. The areas of calculating employees (*e.g.*, whether to include temporary and/or part-time employees) for WARN

coverage, and the rules for calculating the WARN timeframe (i.e., 30 *and* 90 day periods) highlight WARN's technical application.

An employer's best practice when anticipating either a plant closing or mass layoff, is to retain a labor and employment lawyer to help you comply with WARN. Finally, when in doubt concerning the application of WARN, the best practice is to send the notice. It is better to send out the notices and not need them than to face WARN's penalties.

2. OWBPA

a. The Basics

An employer's decision to terminate or lay off certain employees, while retaining others, may lead discharged workers to believe that they were discriminated against on their age, race, sex, national origin, religion, or disability.

To minimize the risk of potential litigation, many employees offer severed employees money or benefits in exchange for a release, or waiver, of liability for all claims connected with the employment relationship, including discrimination claims under civil rights laws such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Equal Pay Act.

In 1990, congress amended the ADEA by adding the Older Workers Benefit Protection Act (OWBPA) to clarify the prohibitions against discrimination on the basis of age. OWBPA establishes specific requirements for a "knowing and voluntary" release of ADEA claims to guarantee that an employee has every opportunity to make an informed

decision whether to sign a waiver. There are additional disclosure requirements under the statute when waivers are requested from a group or class of employees.

OWBPA lists seven factors that must be satisfied for a waiver of age discrimination claims to be considered "knowing and voluntary." At a minimum:

1. A waiver must be written in a manner that can be clearly understood. EEOC regulations emphasize that waivers must be drafted in plain language geared to the level of comprehension and education of the average individual(s) eligible to participate. Usually this requires the elimination of technical jargon and long, complex sentences. In addition, the waiver must not have the effect of misleading, misinforming, or failing to inform participants and must present any advantages or disadvantages without either exaggerating the benefits or minimizing the limitations.

2. A waiver must specifically refer to rights or claims arising under the ADEA. EEOC regulations specifically state that an OWBPA waiver must expressly spell out the Age Discrimination in Employment Act by name.

3. A waiver must advise the employee in writing to consult an attorney before accepting the agreement.

4. A waiver must provide the employee with at least 21 days to consider the offer. The regulations clarify that the 21-day consideration period runs from the date of the employer's final offer. If material changes to the final offer are made, the 21-day period starts over.

5. A waiver must give an employee seven days to revoke his or her signature. The seven-day revocation period cannot be changed or waived by either party for any reason.

6. A waiver must not include rights and claims that may arise after the date on which the waiver is executed. This provision bars waiving rights regarding new acts of discrimination that occur after the date of signing, such as a claim that an employer retaliated against a former employee who filed a charge with the EEOC by giving an unfavorable reference to a prospective employer.

7. A waiver must be supported by consideration in addition to that which the employee already is entitled. It is considered a best practice for an employer to specifically state in the agreement those benefits which an employee will receive in exchange for executing the waiver, and that the

receipt of these benefits are in addition to those benefits, if any, that the employee will receive if the employee refuses to execute the agreement.

If a waiver of age claims fails to meet any of these seven requirements, it is invalid and unenforceable.

b. Additional Requirements for Group Layoffs of Employees Age 40 and Over

When employers decide to reduce their workforce by laying off or terminating a group of employees, they usually do so pursuant to two types of programs: "Exit incentive programs" and "other employment termination programs." When a waiver is offered to employees in connection with one of these types of programs, an employer must provide enough information about the factors it used in making selections to allow employees who were laid off to determine whether older employees were terminated while younger ones were retained.

Typically, an exit incentive program is a voluntary program where an employer offers two or more employees, such as older employees or those in specific organizational units or job functions, additional consideration to persuade them to voluntarily resign and sign a waiver. An "other employment termination program" generally refers to a program where two or more employees are involuntarily terminated and are offered additional consideration in return for their decision to sign a waiver.

Whether a "program" exists depends on the facts and circumstances of each case; however, the general rule is that a program exists if an employer offers additional consideration, or an incentive to leave, in exchange for signing a waiver to more than one employee. By contrast, if a large employer terminated five employees in different units

for cause (*e.g.*, poor performance) over the course of several days or months, it is unlikely that a program exists. In both exit incentive and other termination programs, the employer determines the terms of the severance agreement, which typically or nonnegotiable.

To be a "knowing and voluntary" waiver utilized for a group of employees, an employer must provide written notice of the layoff and at least 45 days to consider the waiver before signing it. Specifically, the employer must inform employees in writing of:

- The "decisional unit" – the class, unit, or group of employees from which the employer chose the employees who were and who were not selected for the program. The particular circumstances of each termination program determine whether the decisional unit is the entire company, a division, a department, employees reporting to a particular manager, or workers in a specific job classification.

- Eligibility factors for the program

- The time limits applicable to the program

- The job titles and ages of all individuals who are eligible or who were selected for the program (the use of age bands broader than one year, such as "age 40-50" does not satisfy this requirement) and the ages of all individuals in the same job classifications or organizational unit who are not eligible or who were not selected.

3. Employee Agreements

Traditionally, Mississippi courts have viewed the relationship between employer and employee as being on equal footing in terms of bargaining power. Thus, the employment at will rule doctrine reflected the belief that individuals should be free to enter into employment contracts of a specified duration, but that no obligations attached it there was no such definite contract. Because employees were allowed to resign their

employment at any time, employers were provided the corresponding right to discharge employees at any time, for any reason.

From the Industrial Revolution continuing to the present, courts and legislatures have significantly altered the employment at will rule. Many statutes, such as the National Labor Relations Act, Title VII of the Civil Rights Act of 1964 and a myriad of other employment statutes, limit an employer's ability to discharge employees at will. Mississippi courts have recognized two judicially created exceptions to employment at will: discharge in violation of public policy[3] and, more importantly for the present discussion, discharge in violation of the terms of an employee handbook[4], discussed below.

a. Contracts

Mississippi employers entering into written contracts with employees must follow the terms of their agreement; this is an obvious limitation on the employment at will rule. Thus, before an employer terminates any employee, the first question should be whether the employee signed an employment contract, and if so, whether the contract defines the reasons for discharge, as well as other pertinent issues.

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[3] In *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993), the Mississippi Supreme Court recognized a narrow public policy exception to the employment at will doctrine: "(1) an employee who refuses to participate in an illegal act … shall not be barred by the common law rule of employment at will from bringing an action in tort for damages against his employer; [and] (2) an employee who is discharged for reporting illegal acts of his employer to the employer or anyone else is not barred by the employment at will doctrine from bringing action in tort for damages against his employer."

[4] *Bobbitt v. The Orchard, Ltd.*, 603 So. 2d 356, 361 (Miss. 1992).

An employer may attempt to preserve the application of the employment at will rule by including a statement disclaiming any intent to alter the employment at will rule or to provide specific benefits to the employee. While such disclaimers can be effective, an employer must carefully craft the language of the disclaimer, or risk being contractually obligated to provide certain benefits. The same concern is present when an employer distributes an employee handbook or other written documents, which Mississippi court have held can alter the employment at will doctrine.

b. Handbooks

Mississippi courts have long held that employee manuals become a part of the employment contract, creating contract rights to which employers may be held. *See, e.g., Bobbitt v. The Orchard, Ltd.*, 603 So. 2d 356, 361 (Miss. 1992). To avoid altering the application of the employment at will rule, employers may include a properly phrased disclaimer in the handbook or other writing provided to employees. "Where there is something in the employee handbook disclaiming a contract of employment, the rule developed in Bobbitt does not apply." *Lee v. Golden Triangle Planning & Development District, Inc.*, 797 So. 2d 845, 848 (Miss. 2001); *see also Byrd v. Imperial Palace of Mississippi*, 807 So. 2d 933 (Miss. 2001).

In *Senseney v. Mississippi Power Co.*, 914 So. 2d 1225 (Miss. Ct. App. 2004), the Mississippi Court of Appeals provided a roadmap for employers seeking to avoid altering the employment at will rule or otherwise incurring liability from an employee handbook, corporate guidelines, or any other documents provided to employees. The roadmap includes:

1. Include a disclaimer. In *Senseney*, the employer, Mississippi Power, did not include a disclaimer in the corporate guidelines provided to the plaintiff that outlined the progressive disciplinary procedure. However, the fact the plaintiff's employment application contained an employment at will disclaimer was sufficient and "expressly placed Senseney on notice that nothing in the corporate guidelines or in any employee handbook was intended to create an employment contract, and that his employment was to be on an at-will basis." *Senseney*, 914 So. 2d at 1229. The application's disclaimer reads:

> No obligation to hire/Employment At Will. I understand that completion of this application does not indicate whether there are any positions currently open nor does it obligate Southern Company to hire me. I also understand and agree that nothing in this employment application, in the Company's policy statements, personnel guidelines or employee handbook is intended to create an offer of employment and compensation with the Company or an employment contract between the Company and me. I understand and agree that employment with the Company will be on an at-will basis, meaning that my employment will be for no definite duration and can be terminated, with or without cause and with or without prior notice, at any time, at the option of either the Company or myself. Further, I understand that, except for an officer of the Company, no supervisor or manager may alter or amend my at will employment status and only an officer of the Company has the authority to enter into any agreement for employment for a specified period of time and any such agreement must be in writing and executed by the Company and me. My signature below certifies that I understand that the foregoing is the sole and entire understanding between the Company and me concerning the duration of my employment and the circumstances under which my employment may be terminated and supersedes all prior arrangements, understandings and representations concern my employment with the Company.

Id. at 1226.

2. Do not provide an exclusive list of permissible grounds for discharge. In *Senseney*, the Mississippi Court of Appeals expressly noted that, if an employee

handbook does not provide exclusive permissible grounds for discharge it is unreasonable for an employee to believe that he may be terminated only for cause. *Senseney*, 914 So. 2d at 1229 (*citing McCrory v. Wal-Mart Stores, Inc.*, 755 So. 2d 1141, 1142 (Miss. Ct. App. 1999)).

3. Draft employee handbooks and other documents provided to employees using permissive, rather than mandatory, terms as much as possible. The *Senseney* Court explained the benefit of using permissive terms:

> Mississippi Power's guidelines concerning discharge and other forms of employee discipline speak in permissive terms of what a manager "should" do and suggest factors that should be taken into consideration. The guidelines state that discharge without warning is "normally appropriate" for only certain unlisted serious offenses. Thus, the guidelines do not purport to create a mandatory employee discipline scheme. The language of the corporate guidelines could not have led Senseney to reasonably believe that Mississippi was contractually bound to wan or counsel him prior to discharge.

Id. at 1229-30.

As previously stated, very few involuntary terminations are risk-free. When the risk level is higher than the employer wishes to assume, many employers approach the terminated employee with the offer of a severance or separation package, also referred to as termination agreement. In exchange for providing compensation and/or benefits to the employee the employer is not otherwise required to provide, the employer will seek a waiver and release of claims by the employee, thereby minimizing the risk of future litigation.

Some employers prepare termination agreements on their own, without the assistance of counsel. In general, this is not a good idea. As the OWBPA section above explained, for those employees over 40 years of age, the employer bears the burden of proving that its release met all of the technical OWBPA requirements. If the release does not comply with the OWBPA, the former employee receives the benefits, but does not waive his or her claims. In fact, the employee now probably believes he or she has a claim, or otherwise the employer would not have tried to "buy off" the former employee. Sometimes perceptions are more dangerous than reality.

While there should be no one standard "form" termination agreement (there should be at least be two different agreements - ones for employees under 40 and over 40), there are certain provisions that should be included in any such agreement. These include the following:

- an agreement on the employee's last day of work;
- a plainly worded waiver and release, indicating the parties' desire to resolve any possible disputes or differences arising from or associated with the employee's employment and termination of employment;
- a statement that the agreement supersedes any and all prior agreements between the parties, whether written or oral (unless there are other agreements that remain in effect, such as a non-competition agreement)
- an explanation of compensation provided, including an explanation of the treatment of compensation for tax purposes (in addition, the employer should ensure an accountant reviews the compensation provisions to determine if distribution implicates the Internal Revenue Code Section 409A's deferred compensation rules);
- an explanation of benefits to be provided;
- a requirement to return all of the employer's property

- confidentiality provisions; and
- non-disparagement provisions

2. Best Practices

While an employer justifiably may wish to present a separation package as a non-negotiable item, this is not the best practice. If an employer wishes to minimize the risk of future litigation, it would do well to listen to an employee's counter-offers, to determine if can allow the employees to shift the cost from some items, such as benefits, to other items, such as compensation. As long as the total costs do not exceed the budget established by the employer for the termination agreement, by negotiating in this manner the employer most likely increases the likelihood of receiving an executed waiver and release, which is the point of the exercise. If your Company makes the decision that a severance agreement is in its best interest, then don't let personalities cause you to lose sight of the ultimate goal – the reduction of risk through a validly executed waiver and release.

C. RIF, Layoffs, Early retirement, and Performance

1. The Basics

Reductions in force, layoffs, and early retirement offers may implicate the WARN Act, as mentioned above. An employer must also follow the heightened provisions of the OWBPA when securing releases of claims from employees over forty, when conducting a reduction in force or early retirement incentive program, as discussed above.

2. Best Practices

When an employer is planning a reduction in force, it must determine the criteria for choosing those employees to be separated. From a legal standpoint, the paramount concern is to limit the employer's exposure to employment discrimination claims. The most conservative approach is to pick one objective factor, such as employment seniority[5], upon which to base all reductions. While this may be the most conservative approach, legally speaking, in this author's opinion, it often is not the best practice.

Outside of the context of a reduction in force or layoff, if asked, most employers would state that an employee's level of seniority is not always an accurate indicator of the employee's productivity or performance. Again, outside of the context of a reduction in force or layoff, if asked, most employers would agree that their duty to their owners is to maintain the most productive workforce, without violating any labor or employment laws.

In a reduction in force or layoff setting, an employer is free to choose any criteria for determining those employees to include in the reduction, as long as the employer does not violate labor and employment laws. Many employers structure their reduction decisions based on such criteria as prior employee discipline, non-FMLA related attendance issues, and performance evaluations. If the prior discipline, attendance documentation, and performance evaluations were not unlawfully motivated, then they should provide a legitimate, nondiscriminatory reason for including employees in the reduction in force.

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[5] Indeed, *bona fide* seniority systems are exempt from disparate impact liability. See 42 U.S.C. § 2000e-2(h).

A reduction in force or layoff may also be the subject of employment discrimination claims using the disparate impact theory. Under this approach, even the application of a facially neutral policy (or criteria for determining layoff) can result in unlawful discrimination against those with a protected characteristic, if the policy or criteria has a disparate impact on the protected group. *See, e.g., Griggs v. Duke Power Co*., 401 U.S. 424 (1971) (Title VII claims); *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005) (ADEA claims).

The best practice for an employer preparing a reduction in force is to create a table or matrix reflecting all employees (identified by each protected characteristic) subject to being included in the reduction, and those included in the reduction because of each particular criteria. If individuals with a certain protected characteristic are over-represented in the reduction in force, then depending on the size of the statistical disparity, there may be a disparate impact.

While a discussion of the requirements of a disparate impact claim are beyond the scope of this paper, generally speaking, proving unlawful disparate impact first requires a statistical demonstration that the employer has an employment policy or practice that causes a significant disparate impact based on a protected characteristic. Once a policy or practice has been proven to cause a significant impact, the employer has the burden of demonstrating that the policy or practice is job related for the positions in question and consistent with business necessity. *See* 42 U.S.C. §2000e-2(k)(1)(A)(i). If the employer satisfies this burden, the case focuses on whether the person challenging the policy or practice can demonstrate that a less discriminatory alternative exists that meets the

business need and whether the employer refuses to adopt it. *See* 42 U.S.C. §2000e-2(k)(1)(A)(ii).

If an employer prepares its business justifications for including individuals in a reduction in force, and reviews a matrix to determine any potential discriminatory adverse impact (and make necessary adjustments to alleviate the adverse impact), the employer may effectively serve its business interests while also reducing the risk of exposure to liability.

D. Terminations: Strategies For Avoiding Claims

1. Update – Supervisor Liability for Wrongful Termination

On February 4, 2014, a three-judge panel of the United States Court of Appeals for the Fifth Circuit issued a decision that effectively sidesteps the employment at will rule in Mississippi, by recognizing personal liability for supervisors who terminate an employee in "bad faith," which the Court interprets "without right or good cause."

Background

In *Vaughan v. Carlock Nissan of Tupelo, Inc. and Corbett Hill*, Dkt. No. 12-60568 (5th Cir., Feb. 4, 2014) (unreported), Sandi Vaughan, a former employee of Carlock Nissan of Tupelo, alleged that her supervisor, Hill, terminated her for reporting illegal activity to the dealership's corporate parent, Nissan USA. Vaughan also alleged that by terminating her for these reasons, Hill tortuously interfered with her employment relationship with the dealership.

Employment-At-Will Rule Prevents Liability for Employer

Vaughan's primary claim was filed against her employer and alleged that Carlock Nissan terminated her for reporting her employer's illegal activity. Mississippi is an employment-at-will state, meaning that absent a contract (or handbook provision) to the contrary, employers may lawfully terminate employees for any reason, with or without notice.

However, since 1993 Mississippi courts have recognized an exception to the employment-at-will rule when an employee (1) refuses to participate in an illegal act or (2) reports an illegal act, and this forms the basis for the termination. *See McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603 (Miss. 1993).

Vaughan's *McArn* claim was dismissed on summary judgment because she failed to demonstrate a genuine issue of material fact regarding whether the conduct she reported was **in fact** illegal. The Fifth Circuit affirmed, and the employment-at-will rule therefore prevented any liability against the employer.

Intentional Interference with Contract Claim Unaffected by Employment-At-Will Rule

Notwithstanding its dismissal of Vaughan's underlying *McArn* claim, the Fifth Circuit held that Vaughan stated a viable claim against Supervisor Hill for tortious interference with employment, when he terminated Vaughan's employment allegedly in bad faith.

One might ask how any of Vaughan's claims would survive summary judgment, when the court found the employment-at-will rule applied to Vaughan's employment, and that her employment could be terminated for any reason. The answer is that Vaughan's

second claim, tortious interference with her employment relationship, exists outside the realm of an employment-at-will relationship with an employer. In fact, as was the case in the Vaughan case, the claim can be directed toward an individual, such as Supervisor Hill, and can lead to personal liability.

Mississippi courts recognize a claim of tortious interference with contract in the employment relationship, and even in the context of employment-at-will (where there is no actual or implied contract). Liability results when one "intentionally and improperly interferes with the performance of a contract between another and a third person by inducting or otherwise causing the third person not to perform the contract …" *Shaw v. Burchfield*, 481 So. 2d 247, 254-55 (Miss. 1985).

To establish a tortious interference claim, Vaughan was required to establish that her termination was:

1. intentional and willful;

2. calculated to cause her damage;

3. done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant; and

4. resulted in actual damage and loss.

In addition, since Hill was a supervisor and was authorized to act on behalf of Carlock Nissan, his interference in Vaughan's employment relationship (*i.e.*, termination) was privileged and would not result in liability, unless he acted in bad faith or outside the scope of his employment. "Bad faith" may be established by showing the supervisor acted with "malice," which the Fifth Circuit defined as terminating Vaughan "without right or good cause."

Fifth Circuit Sends Bad Faith Termination Claim Against Supervisor to Jury Trial

The Court turned to Vaughan's allegations and Hill's stated reasons for Vaughan's termination to determine whether there existed a genuine issue of material fact, which would require Vaughan's claim to be decided by a jury.

The Fifth Circuit noted that Vaughan claimed Hill told her on the day she was fired that she had "no right to report these things to Nissan," and that her termination occurred only four days after she called Nissan and specifically named Hill as the bad actor. In contrast, Hill claimed that he knew Vaughan complained to Nissan USA, but he did not know Vaughan complained about him.

Hill claimed that he terminated Vaughan for the following reasons: as a cost cutting measure; because she complained to Nissan USA, including the fact she did not raise her concerns with Hill first; and because Vaughan initially denied calling Nissan USA.

The Fifth Circuit decided that determining which party to believe, Vaughan or Hill, involved credibility determinations inappropriate for summary judgment. "Whether to credit [Hill's] alternative explanations – and, for that matter, whether to credit his assertion that he was unaware of the contents of Vaughan's complaints because he did not read the document [containing Vaughan's complaints] he was handed and that listed Vaughan's name at the top – as "good causes" within the meaning of Mississippi's bad faith exception involves credibility determinations inappropriate for summary judgment."

The Court concluded, "Reading the record in the light most favorable to Vaughan, we conclude that she has presented sufficient evidence to create a genuine issue of

material fact with respect to whether Hill fired her for exposing allegedly illegal activities at the dealership, which we think suffices as bad faith termination under Mississippi law."

Best Practices

Mississippi employers and supervisors should be concerned about this Fifth Circuit panel's recognition of a "bad faith termination" claim in *Vaughan*, although it is not clear how much weight the analysis in this unreported case will be given by other courts and by other panels within the Fifth Circuit. This decision highlights the importance of implementing termination "best practices," such as two-level review of termination decisions and documenting a good reason for termination, rather than relying solely on the employment-at-will rule to justify an employee's discharge.

This case also provides an additional reason for employers to provide supervisory training in human resources and personnel matters. Supervisors may be come more interested in the discussion when they learn that they may be held personally liable for "bad faith termination' when they have failed to adequately document and cannot otherwise prove "good cause" justifying a termination decision.

2. Checklist of Best Practices for Avoiding Wrongful Discharge Claims

a. Draft clear and easily applicable employment policies and train managers/supervisors on their application of the policies.

b. Make the right hiring decision - spend as much time as needed in the interview process.

c. Treat employees fairly.

d. Train employees in the art of effective supervision.

e. Adhere to company policy (unless you have a very good reason to deviate, and if so, then document).

f. Investigate disciplinary matters, be honest, and provide constructive feedback.

g. Document, document, document.

h. Consider having a second person review the decision to discipline/discharge.

i. Restrict communications concerning the discharged employee.

j. Set the example by vigorously opposing meritless claims filed by former employees.