The Employment Law Counselor Episode 19

PLUS Staff: [00:00:00] Welcome to this PLUS Podcast, *The Employment Law Counselor*. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own and do not necessarily represent the views of their employers or of, PLUS. The contents of these materials may not be relied upon as legal advice.

Victoria Fuller: Hey everyone. Welcome to *The Employment Law Counselor* podcast. We're your hosts, Victoria Fuller and Laura Corvo. Today we're going to be discussing reductions in risk for reductions in force.

This podcast is a collaboration between White and Williams LLP and the Professional Liability Underwriting Society, commonly known as PLUS. While our podcast is not legal advice, it is a practical discussion between attorneys that deal with the maze and minefield of labor and employment laws on a daily basis. If you like what you hear today, please give us a five-star review and subscribe so you never have [00:01:00] to miss an episode.

Laura Corvo: During this time of economic uncertainty, we're starting to see some employers look to reductions in force as a way to right size their workforce and shore up their fiscal position to meet economic needs. But there are a lot of considerations for any employer who may be planning or potentially planning to downsize its workforce, including things like risk mitigation, legal compliance, severance considerations, messaging, and more. Today, Vicki and I, along with our colleague and friend Will Raven, are going to walk you through some of these issues.

Victoria Fuller: That's right Laura. I do want to introduce Will Raven to our listeners. He's an associate in our labor and employment group. He practices out of our Boston office. He and I work together a lot. [I am] very excited to have him on this podcast today. He is truly a seasoned employment litigator. He's defended employers in all [00:02:00] types of employment claims, and he's here to help us talk about reductions in force.

Hey, Will, how are you doing today?

William Raven: Great Vicki, and I'm very excited to be here today.

Laura Corvo: Will, we're really excited to have you able to join us here today. This is probably a good time to jump into our topic. Vicki, when employers start to think about reduction in force, probably the most complex issue we have to tackle is whether or not they need to comply with what, I guess we could call a very comprehensive and complex statute called the WARN Act, or the Worker Adjustment Retraining Notification Act. Let's just call it WARN. They have to kind of figure out whether they comply with it [and] what their obligations are. Can you kind of start us with that hard part and walk us through what the WARN Act is and which employers may have to comply with it?

Victoria Fuller: Absolutely. I just want to kick off by saying, when we're talking about reductions in force, that is a big topic. That [00:03:00] doesn't just mean big employers. When we launch into talking about WARN act, we're typically talking about the very large employers who are terminating many, many employees at once. Once we get past WARN, we will talk about some of the other laws that apply to reductions in force. But I just want to set the table for our listeners that if you're a small employer or a mid-size employer and you're saying, "Well, this doesn't apply to me," keep listening because there are other things that you need to know about.

With that said, let's talk about WARN. When we're talking about WARN, there are two different things to think about. There's the federal WARN Act, and then there are the mini-WARN acts, the state level warrant acts. They're not the same thing. It's important to analyze not just whether you as an employer have to comply with federal WARN, but whether you may also have to comply with the state WARN Acts

The WARN Act, Laura, as you said, it's a big statute. There's a lot of moving pieces. For our purposes on this podcast, [00:04:00] I'm just going to kind of go over the big picture things.

Certainly, if our listeners think, "Well, we might need to move into a reduction in force," please get legal counsel because there are many nuances to the statute. You don't want to make a mistake because you're not familiar with, or you're not being guided by counsel on all of those compliance issues.

So, okay, what is the federal WARN Act? It applies to employers with 100 or more full-time employees. This does not include workers with fewer than six months' employment or time on the job. So, what is it? It requires advanced written notice of a work site closing affecting 50 or more employees or a mass layoff affecting at least 50 employees who comprise one third of the work site's total workforce or 500 or more employees during a 90-day period. The time

period for notice is 60 days, so you have to give the employees at least 60 days [00:05:00] notice of this site closing or the layoff.

There are some limited exceptions. For example, sometimes a business can't give the 60 days' notice because of unforeseen business circumstances. I know we're dealing in a time of high volatility in lots of economic areas and industries. So, if you just can't give the 60 days' notice, know that there is that exception, but you need counsel to help guide you on how to prove that.

The second one that I'll just mention is natural disasters. Again, this is something that we're seeing more and more. Whether you're an employer in California or on the coast where there are hurricanes, sometimes you have a natural disaster that destroys a work site and you just don't have time to give that 60 days' notice.

The third component of it is the notice itself. The notice depends on what type of workforce you have. If you have non-unionized employees, it [00:06:00] has to go to them. If you have unionized employees, it would go to the union rep. You also have to give additional notice, which again, I would say just get counsel on this to help you notify state agency or federal agency as necessary.

I just want to briefly mention that there are damages that are fairly substantial for failing to comply with the WARN Act. It can result in a ward of back pay and benefits. There are civil penalties. When you're talking about mass layoffs [and] lots of affected employees, those back pay and benefit damages can really add up.

Laura Corvo: So, Will, Vicki mentioned the WARN Act and the obligations that she just described often impact very large employers and very large layoffs. Right? But there are a number of states who have these so-called mini-WARN Acts, which often impact smaller employers or have obligations that go beyond the WARN Act.

William Raven: That's right, Laura. In fact, there are states that have mini-WARN [00:07:00] acts on the books. These states include California, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Hampshire, New Jersey, New York, Tennessee, Vermont, Wisconsin, and Washington. Washington just enacted it's mini-WARN this year.

Like we talked about, some of these states brought in the notice obligations. For example, New York, Maine and New Jersey required 90 days' notice as opposed to the WARN Act 60 days' notice. Some of these states also expand

the protections of their mini-WARN Acts to a broader range of employers. Rather than a requirement that the employer employs a hundred employees, some of these states apply to smaller employers. So, it's just important that if you're considering a layoff, that you know where all your employers are located and you contact counsel in each of those jurisdictions.

Victoria Fuller: Isn't it case that some of these states also require severance?

William Raven: That's true, Vicki. For example, Maine requires mandatory severance, so does [00:08:00] Hawaii and New Jersey as well. These states have different requirements for eligibility. For example, in Maine, employees must be employed for the last three years at the time of the event, not be terminated for cause, not have accepted employment at another location, and not remain employed by the covered establishment at the time of the layoff. Hawaii also has mandatory severance

Laura is going to tell us about New Jersey as she deals with that in detail.

Laura Corvo: Yeah, that's right, Will. New Jersey amended its mini-WARN Act, probably right before the COVID pandemic, to have these additional mandatory severance requirements go into effect. They kind of put a pause on it during the pandemic, realizing the economic impact would really potentially destroy some employers, but then they revived it in, I think, 2023.

The way it works is that an employer who has a hundred employees anywhere nationwide, it doesn't have to be a hundred employees in New Jersey, and has a layoff that impacts 50 [00:09:00] employees who are New Jersey based. It's kind of interesting because it doesn't require that they be at the same site of employment. They could be at multiple employment sites. It's also triggered when you have 50 employees who report to a New Jersey site, so thinking remote employees. So, if you have 50 remote employees who may not even live or work in New Jersey, but they report to a New Jersey site, the WARN Act may be triggered.

It requires 90 days' notice [and] then one week of severance for every year of service. That's a statutory requirement. It's not something that's part of a release or a separation agreement, which we'll get into a little bit later. It's statutory, it's required. You have to pay it no matter what. If you don't pay it or if you fail to provide the 90 day notice, there are penalties which include providing an additional four weeks of severance. So, for New Jersey [00:10:00] based employees who are,considering a reduction in force, it's really, really important

that they get with counsel to see if the statute will impact them and to plan for it because it becomes a very expensive undertaking.

William Raven: Right. The differences between the state mini-WARN Acts and the federal WARN acts aren't limited to what we just talked about. There's a lot of nuances in there. I mean, like Laura just said, it's very important to consult counsel if you're thinking a mass layoff is necessary.

Victoria Fuller: As I mentioned before we launched into WARN Act, there are other potentially applicable laws at play here when we're talking about reductions in force.

Before we get into that, even when we're talking about a reduction in force, many times the way this comes up initially is more of a workforce planning. It could be restructuring. It could be reorganization, It could be a combination of that with layoffs. So, there are many, many [00:11:00] kind of tools in the toolbox that we see when employers are hitting hard times. Laura, can you talk about some of these different things, you know, whether it's the layoffs or restructuring the organization or a department. Can you give our listeners a walkthrough on those options?

Laura Corvo: Yeah, Vicki, that's right. When you want to engage in cost saving measures there's a couple of options. Most employers think of layoffs, where you terminate employees, and that's a very common option. It's an option you may need to get to, but it's not your only option to save money when it comes to saving payroll costs.

Another option is to reduce the number of hours your employees work. If you have hourly based employees, you can just offer them less time, less shifts. Instead of working five days a week, maybe it's three days a week. When you're doing something like [00:12:00] that, you want to really be careful to make sure you are complying with wage and hour laws and overtime laws. Also, sometimes a reduction in hours can trigger an unemployment obligation. If somebody's hours are cut a certain amount of time, they may be able to collect unemployment for the difference.

You can also think about pay cuts or salary reductions. [If] your payroll costs are too high [and] you can't pay employees, you may have to pull back on what you pay your employees. It's an option. When you do it, you have to be very careful. There are, for example, exemption requirements. Employees may have to meet certain salary thresholds to be exempt from overtime. When you're

doing salary reductions, you want to make sure you're not impacting that threshold.

You could also look at, and we did this a lot during the [00:13:00] pandemic, what we call furloughs. The furlough can be a number of different things. It's kind of like putting a pause on the employment relationship, right? You could have an employee who you don't want to lose, but you know you can't pay them for the next month, so you furlough them. Maybe you keep them on their benefits for a short period of time, but you have them not working for that period of time. Again, there's unemployment triggers that may happen.

Some employers do what we call rolling layoffs, where they may have an employee, for example, work one week on and one week off. Again, lot of complexities with this.

There are a number of options when it comes to cost saving measures, but you do want to think of things. Whenever you're doing any of these, you want to make sure [you have] counsel with you to guide you. [You] also [want to think of] things like, are your job descriptions up to date? Are you doing things in an equitable [00:14:00] fashion? You don't want to trigger a pay equity claim or another discrimination claim. Are you impacting age and other protected classes?

It's a complex area, but I always tell employers when you're thinking about, knowing that you have to cut some of your payroll costs, it's probably a good time to start to explore these various different options. Start to talk to your council. You can map it out. It's something that we should be long-term planning and not decided quickly or overnight. Those types of furloughs, reductions where you do it quickly are often the ones where you make the most mistakes.

Victoria Fuller: I just want to jump in and echo that, Laura, how important this is to plan and not do impulsively.

This is one of those things where I feel like we all have some conflict avoidance, right? Like we just don't want to think about it. It's hard thinking about things like cutting somebody's pay. It's hard to think about having to terminate employees. It's [00:15:00] not something that we can wait till the last minute. We really do need to map it out so that we can identify risks [and] mitigate those risks. For example, where you have a lot of remote workers, you have to go look into the laws and various jurisdictions and make sure you're complying with everything.

We'll talk about risk mitigation in a minute, but I just wanted to echo that, how important it is not to do this as a last minute, "Okay, now we're going to do it." No, we have to plan this out.

Laura Corvo: To that point, Vicki, I think we both probably had the experience where an employer may start out saying, "Oh, what we're going to do is lay everybody off," or, "Oh, we're going to start to cut salaries." Then when they walk through it and they think about it, the plan changes. It becomes more dynamic, so you kind of have to allow yourself to go through that process/ [Through] that planning process, you develop your best course of action when you're really thoughtful and take the time to kind of think through it.

Victoria Fuller: 100%. So, once we've kind of figured out what we're [00:16:00] going to do for our workforce planning, now we've decided that plan involves some terminations of employees, for purposes of this podcast, we're going to do a RIF. This is not necessarily a WARN triggering RIF, but we're going to do a RIF. We need to figure out who's going to be affected, who are the affected employees.

There are different ways to go about making that decision. I pause because a common theme that we see is employers use the RIF as an opportunity to terminate underperforming employees. I'm not necessarily saying, don't do that. But before you say, "We're just going to terminate all the underperforming employees," like Laura was saying, we've got to plan this out. We've got to do the deep dive.

Anytime you do a RIF, there are legal risks. The first way to mitigate that risk is to come up with your legitimate non-discriminatory criteria for [00:17:00] termination. It could be seniority. It could be workflow. It could be performance. It could be any number of factors, but it has to be laid out, objective and applied consistently across the departments or affected employees, whoever's being affected, you need to apply the same criteria.

This can be complicated when you have multiple decision makers. Sometimes the decision is made within HR. Sometimes the company says to the managers of various units or departments, "Okay, you have to eliminate 5% of your group," or "You have to eliminate three people," and it's up to the managers to decide who is going to be on that list of affected employees. When you do that. What you don't want after the fact is different managers using different criteria to determine who's going to be affected. You want everybody making the decision using objective criteria that is [00:18:00] defensible and it is applied consistently.

Once you've got your list of names, here are the affected employees, you want to do a look back on those employees. If performance is one of the characteristics that you're relying on for determining who's affected, look at their reviews. Do their reviews reflect that they have performance issues?

This comes up over and over again where you have a manager that says, “Suzy Q has been underperforming for years, and so she should be as part of the group.” Well, we go and look at her reviews and her reviews don't reflect that she's underperforming because maybe she had different managers who had different standards. Maybe the managers were being nice or did the review quickly, or whatever the reason is. But now we've identified this as a risk. We're terminating her for performance reasons, which is not reflected in the documentation.

We also need to make sure that each decision maker is documenting why a certain person has been included. So if it's [00:19:00] Suzy Q, because of performance, we should have some kind of documentation explaining why this person was included and why these other folks were not. This can be used as evidence on the backend if it's ever challenged to show that the manager applied the objective criteria to the process.

Laura Corvo: Vicki, just to jump in, a lot of times employers mess this up, right? They think, to your point earlier, “We’re going to get rid of these bad employees. We're going to do this, and we're going to base it on performance.” Then you go back and say, “Okay, well, where's the performance documentation?” and it's just not there. Then all of a sudden that RIF is subject to legal challenge.

Victoria Fuller: Exactly. We want to make sure that our documentation's in order, that we have backup to support it. If there has not been corrective action, if there are no write-ups [and] the reviews look good [then] there's nothing there to suggest that this employee has.[00:20:00] performance issues. Just be aware that that is a risk if you include that person in the affected employees. Again, it doesn't mean you don't do it. I mean for business reasons. If that is the right person to include, you include them. But be aware that you've now got a risk.

So, now we've determined our affected class. Laura, walk us through severance. When we're talking about severance, we're not talking about those states that require severance under the WARN Act. That's a different issue. Can you talk to us about why an employer would offer severance on a discretionary basis or voluntarily to employees who are affected by a RIF?

Laura Corvo: Yeah, Vicki. I will tell you this, that I always recommend that an employer who is terminating employees through a RIF provides severance if they can. Understanding that, of course, sometimes when you're doing a layoff, you're doing it because you don't have any money. But to the extent you can, I think it's very wise to provide [00:21:00] employees severance.

With that severance, require them to sign a separation agreement containing a release of claims so that you buy yourself a piece of insurance knowing that the departing employee is not going to come back and sue you or file a claim with the EEOC or Wage and Hour Bureau. It's just a way to close your eyes at night knowing that once you've done this cost saving measure, you don't have any potential mine fields that might blow up, which wind up costing you even more money in litigation. So, it's always wise to do that.

When you do provide severance in a RIF situation, you always have to be aware of the Older Workers' Benefit Protection Act. A lot of employers know about this when they do single terminations. But under the Workers' Benefit Protection Act, whenever you offer severance to a group [00:22:00] of two or more employees group, defined as two or more so that's not very big group, you have to provide certain notices and provide certain disclosures.

[The] first thing you have to do is provide the employees with up to 45 days to consider the severance agreement that you're giving them. It's 21 days for a single person termination under the statute, but 45 days for a group termination. Does that mean the employee has to wait the full 45 days? No, but you have to at least give them that amount of time to consider whatever you've provided them. Once they sign it, and they can always sign before the 45 days, they have seven days to change their mind and revoke the agreement.

Because of this revocation wrinkle, we always recommend that whatever you're going to pay the [00:23:00] employee, that severance or that benefit, doesn't trigger until that revocation period has expired. You don't want to pay the employee immediately upon termination if they're over 40, you want to wait through the seven day revocation period. If you don't do that, there is a chance that the employee has not fully released their claim of age discrimination. That employee can come back and sue you, so you don't have that insurance.

The other thing you have to do, and this is really complex and [you] likely need some very close legal guidance, is provide notifications to the departing employees who are receiving the severance about the individuals who were selected and not selected, including the description of the criteria. It doesn't have to be a full description, but “We made the decision based on performance,

based on seniority, based on workflow." That has to be included, as [00:24:00] well as the ages of the people who were selected and not selected in the employee's work group. That can be defined in multiple different ways. This is where you have to get with council, often, to determine [if you]are looking at this by department, by title, by location. There're different ways you can look at it, but you have to make certain disclosures to those employees in order for that release to be valid.

It's a complicated thing and most employees who are going to be terminating people in a layoff are going to have some employees over the age of 40. When you're preparing those separation agreements, you want to make sure you consider this issue of how the Older Workers Benefit Protection Act comes into play.

Another thing you want to do with severance is consider what your formula is for it. Are you giving, for example, two weeks to everybody, a week per year of service? If you have WARN Act [00:25:00] obligations, are you giving a little bit more? Is it COBRA? What can you afford? You do want to come up with some sort of formula so that you don't have a claim that you've offered more severance to one group of employees than to another.

Another thing with severance that becomes important is how you communicate it to the employee, right? We've all seen the, or heard the stories of the CEO who gets everybody on a Zoom call and terminates a thousand employees all at once. Well, that company is likely going to get a lot of claims because employees are not going to be happy. Regardless of what you do when you terminate an employee, they're not going to be happy, but the way you deliver the messaging sometimes just cushions the blow a little bit.

I think it's important to develop a good communication strategy for how you're going to communicate what the severance is and how you're going to help that employee, maybe just at [00:26:00] least bridge the gap a little bit until their next job.

With that communication, you also want to think about what you're going to tell your remaining workforce, right? Because you don't want to cause a panic. People think, "Oh, you know, all these people were just laid off. Am I next?" So you want to come up with a communication strategy to ease the concerns of the people who are left because likely they are going to be nervous that either they're going to be terminated or that their workflow is going to increase or that things are not solid. You want to reassure them in some way.

I guess in summary, it's always a really good idea to offer severance and to get a release from the departing employees. But I know that's not always possible. Vicki, as a result, I think employers need to understand what their litigation risks are from RIFs.

Victoria Fuller: Yeah, and one thing I want to pick up on that you were [00:27:00] talking about is you're talking about all of these nuances in these agreements. We used to say, "Don't go on Google. Don't Google and find a form on Google." Now, please don't use chat GPT. Please don't use AI to help you draft this. This is a really important document. There are a lot of nuances to it. Please go seek counsel and have counsel help you with it. There's a lot of information that needs to be just right or very likely you're giving severance but not actually getting an enforceable release on one or more aspects.

The other reason this can become more complicated is, as Laura said, you might end up with a situation where you have some employees who are being terminated, but others are staying. It may turn into a rolling layoff. The information may change over time and it needs to be handled appropriately [and] sensitively but also in legal compliance so that you don't end up with an inadvertent OWBPA violation.

So, let's talk [00:28:00] about the overview of all the different ways that an employer can face a claim arising out of a RIF. I'm just going to touch on some of these. Certainly again, employers, if you think you're going to have one or you may have one, please talk to counsel because this is just an overview.

The first thing I want to talk about are wage and hour claims, particularly for employers who have remote workers [and] workers in multiple jurisdictions. Please make sure that you've nailed down what the wage and hour laws are in each of those jurisdictions that may apply to your workers before taking any action.

I will use the Massachusetts Wage Act as a lesson point. In Massachusetts, our wage act is strict liability. It requires payment for a terminated employee on the day of their termination. That includes their final wages as well as their accrued, but unused [00:29:00] PTO. If you terminate the employee but do not provide those timely wages, it results in automatic multiple damages and attorney's fees if they have to sue you.

Why is this important? We don't want to confuse final wages and PTO with severance. They're not the same thing. You have to timely pay final pay and PTO. Then you're offering the severance and they get there 45 days to consider

it. That doesn't impact when they get paid that final paycheck. So, the wage and hour laws differ from state to state. I'm not saying every state is like Massachusetts but certainly know what's going on in each of your jurisdictions. Make sure that you're timely paying final paychecks and PTO if it's required to be paid out.

Another thing that comes up in RIFs are discrimination claims. “Why was I included in the RIF and not so and so?” Number one, this reinforces the reason for having a formula versus doing [00:30:00] discretionary severance. When you apply a formula, you're much less likely to get somebody who's trying to come up with a claim to get more money because everyone is being treated equitably in their severance. Whether it's, Laura said, two weeks per year or everyone gets exactly two weeks, pick your formula [and] run with it. Discretion just breeds claims.

The other issue is if you haven't nailed down your objective, legitimate non-discriminatory reasons for inclusion and there's any wiggle room in there, someone is going to bring a discrimination claim saying, “Well, I was included because I'm over 40,” or “I'm in this other protected category.”

We just had the Supreme Court issue a decision on a case that everybody's been watching. We just did a webinar a couple of months ago for PLUS, and we talked about the Ames case. We were waiting with bated breath to see what the Supreme Court was going to do and now we have it.

Will I know you've done the [00:31:00] deep dive on this case, can you help educate our listeners on what the Supreme Court said here?

William Raven: Sure, Vicki. In *Ames*, the Supreme Court decided whether plaintiffs from a majority group, heterosexual white individuals, for example, must meet a heightened evidentiary standard to bring a discrimination claim under a Title VII of the Civil Rights Act.

Marlene Ames, a heterosexual woman. She was employed by the Ohio Department of Youth Services since 2004. In the lawsuit, she claims that she was denied a promotion in favor of a lesbian woman, and she was demoted from her role as a PREA administrator, which was then filled by a gay man. She filed the Title VII lawsuit based on sexual orientation and gender, sex.

Both the district court and the Sixth Circuit Court of Appeals ruled against her. They applied the rule requiring the majority group plaintiffs show background circumstances, suggesting that there's unusual discrimination based on a history

against a majority group, basically. The sixth [00:32:00] circuit held that Ames failed to meet this burden and affirm summary judgment for the employer.

Ultimately, when the Supreme Court got its hands on it, they ruled that Title VII text does not distinguish between majority and minority plaintiffs in the *McDonald Douglas* burden shifting framework for proving discrimination is meant to be non-onerous at the prima fascist stage. They ultimately held that imposing a higher burden on majority group plaintiffs is inconsistent with the statute and in their prior precedent as well.

In sum, the court clarified that all employees, regardless of majority or minority status, are equally protected under Title VII. Plaintiffs do not need to show background circumstances to bring a discrimination claim simply because they belong to a majority group. This is important to note because this decision could lead to an increase in lawsuits as the burden that plaintiffs must meet has been lessened according to *Ames*.

Victoria Fuller: It sounds like the takeaway here is there is no heightened evidentiary burden on [00:33:00] employees who are not in traditional protected categories.

In other words, the playing field is otherwise the level, whether you're white, not white, gay, not gay. The evidentiary standard for a plaintiff is the same. Is that about right?

William Raven: That's right, Vicki. If anything, it makes it even more important for employer to button up their documentation, compensation structures and, as it relates to RIFs, ensure they've done everything possible to minimize these discrimination risks we've just touched on.

Victoria Fuller: Yeah, I completely agree with you. I would not take any employee for granted when you're looking at risk assessment. You want to do a deep dive on each one who's affected and see if there's any risk in that profile and that employee's profile.

You know we're talking about risk, and we talked about wage and hour laws. But really there are so many things an employer wants to make sure that they have buttoned up, whether it's compliance with estates [or] personal records law. It's making sure they have their documentation on performance issues like we discussed before.

I would walk [00:34:00] through each of these things with counsel and just make sure. You can't necessarily eliminate all risks, but you can at least identify them and then make a plan for them going forward.

Part of that plan is making sure that you have appropriate EPLI coverage. Again, you can't guarantee that a departing employee won't bring a claim, but that's why you have the insurance to stand behind you and defend you as an employer if you do get a discrimination claim.

One thing that we see as defense counsel is many times employers get their policy and they think, “Great, I have a policy. If the employee sues me, I've got coverage. I don't need to worry about anything,” but that's not necessarily the case there.

I say that in two ways. One, the employer needs to think about their self-insurance. For example, if they have a $10,000 deductible, [00:35:00] a $25,000 deductible, they want to make sure they have enough money set aside, particularly in a RIF situation to cover any potential deductible or self-insured retention for claims that they think may be coming. If you anticipate up to three claims, make sure you have up to three deductibles set aside somewhere to cover those claims if they do in fact come.

The other issue is understanding what your policy covers versus doesn't cover. For example, your policy may cover discrimination claims. Many EPL policies do not cover wage and hour claims. I'm not telling you what your individual policy covers or doesn't cover, but make sure you know what it covers, so that if you are going into a RIF, you have an understanding of what the policy may respond to versus what you may have to self-insure if you don't have coverage for it.

The other issue is when you are trying to mitigate these [00:36:00] risks, one piece of information you want to look at across all affected employees is, “Can I identify a disparate impact in the numbers?” So, [you are] looking at everything. You look at your affected employees. You look at the unaffected employees. You, statistically you want to look at, “Do I have a disproportionate number of individuals in any class that are being terminated versus people not in that class?”

Say you identify in your group of affected employees, you have a disproportionate number of one protected class in there versus the total number of that class in your workforce. You’re going to want to ask why that's happening. Did managers apply the non-discriminatory objective factors

appropriately, or did something happen that inadvertently led to these folks being included in the effective group? So, definitely look at the potential for disparate impact and whether decisions should be changed as a [00:37:00] result on who is affected and who is not.

The other potential area of risk that we should talk about are leave claims. You may have employees who are out on protected leave who you end up including in your affected employee group. If you have an employee out on FMLA, it doesn't mean they can't be terminated. However, you need to look at the circumstances to see, " Is there a risk here for an interference or retaliation claim?" For example, did you start the workforce planning, did you start the RIF planning before the individual went out on leave or while they were already out on leave? If they were already out on leave, that could be a potential risk for you.

In some states, the leave laws are more. Employee friendly than the national FMLA. For example, here in Massachusetts, we have a paid Family and Medical Leave Act that has a presumption of retaliation built into the [00:38:00] statute. What that means effectively is if an employer terminates an employee within six months of that employee's exercise of their rights under the statute or attempt to exercise their right, the employer, even though the employer's the defendant, has the burden to prove that they did not retaliate against the employee. It's a very high standard, a very difficult standard to meet. So again, does that mean you can't terminate the employee? No, but it means there's risk there and you need to manage that risk.

Laura Corvo: Vicki, when it comes to leave claims with RIFs, sometimes the leave employees are the problem employees, and they're the ones that you're trying to maybe include in that.

You've got to be so careful for the reasons you just said. I've found in my experience that the lawsuits that most likely come up after a RIF have been the leave employees who are on leave or had some sort of [00:39:00] leave protection.

Victoria Fuller: Those types of claims are very difficult to resolve at an early stage because they are so fact intensive. Those ones are going to generate the most fees because you have to get so far down the road to prove your case.

The other thing that I've seen in that respect is you talk to the employer and the employer says, "Oh yeah, no, we've been planning this for a really long time. Much, much longer before the employee went out on leave." [Then] you say,

“Okay, great. Give me the documentation that shows you were planning it going back, way back when.” And then they say, “Oh, we don't have any.” Okay, well then we can't prove it. Well, not that we can't, but it's going to be very hard if you have no documentation to show when you started the process, what you were doing up until they went out on leave. That creates a evidentiary issue that will complicate your defense.

We've talked on and off during this podcast about remote employees. There's an issue we haven't talked about, which is class actions. Will, can you kind of walk us through the class action [00:40:00] issue?

William Raven: Sure, absolutely, Vicki. Specifically, there's a 2022 case, *Piron v. General Dynamics Information Technology,* out of the Eastern District Court for the US District Court of Virginia. [In]that case, the Eastern District there considered whether remote employees working under a flexible work arrangement could be treated as working at a single site of employment under the WARN Act.

The case arose after the company laid off a group of remote workers without providing the required 60-day notice. These employees were subject to a company-wide flexible work location policy, allowing them to work either from the company office or an alternate location, like their home. This group filed a class action and the employer, of course, opposed class certification, arguing that the WARN Act’s notice requirement didn't apply because the employees didn't work at a single site.

According to the employer, determining each employee's work site would require an individualized analysis, undermining the predominance requirement for class certification under Rule 23 B3 [00:41:00]. However, the court disagreed. It found that the company's remote work policy applied uniformly across the proposed class and concerned as a common basis for determining that employment site.

Therefore, the court ultimately held that the key legal and factual questions were shared among class members in granted class certification. I think *Piron* underscores a significant risk for employers managing remote or hybrid workforces. Layoffs involving such employees might still trigger WARN Act obligations. The case also highlights how important a consistent remote work policy is to support an argument that remote employees are simply situated for purposes of class action litigation.

Laura Corvo: Yeah. Will, it sounds like between the class actions you just discussed and all of the potentials for litigation that Vicki discussed that there are so many risks for employers.

Vicki, how do employers go about trying to manage these risks? What should they be doing? Because sometimes a RIF is inevitable, right? You know, [00:42:00] again, as we started out this podcast, a lot of times employers are in this situation because of an economic uncertainty or an economic situation requires them to cut funds. How do you do that in a way that's going to avoid these risks?

Victoria Fuller: Laura, I think you really nailed it early on when you said that employers really need to be proactive rather than reactive to get counsel involved early on to really plan out what they're going to do. That plan may change over time, but at least it gives you more options, gives you more opportunity, to identify those risks [and] to mitigate them to the extent possible.

The other thing that we talked about is, and Will touched on this, documentation needs to be impeccable. I can't tell you how many times in litigation we say, "Okay, employer, please give us your personnel file for this employee" and they [00:43:00] either, number one, don't have anything, or number two, they sent us something and we're like, "What is this? Where is everything else? Where are all the documents that are required to be in a personnel file?"

Different states have different requirements for what's supposed to be in there. Not having that documentation is not just a technical problem. It's a real defense problem because so many documents that are required to be in a personnel file are your first line of defense against a suit.

The other thing, and we mentioned this earlier, making sure that you know where all of your employees are, what the law is and all of those jurisdictions and what you're supposed to do to comply. Remote workforces are here to stay, and we just have to make sure that we know what law applies to those employees so that we don't inadvertently have a compliance issue.

And then, just touching on the last piece that we identified earlier, find your risks. Pretending they don't exist is not the best strategy. Find them, [00:44:00] talk about them with counsel. Figure out what you can do to either minimize them or plan for them if you can't minimize them.

And I think with that, we are out of time. Laura.

Laura Corvo: Yeah. It's about planning, Vicki.

I think we are out of time. I do want to thank our guest here today. Will, it was great having you and having you in on this discussion of this very interesting topic.

William Raven: Well, thanks for having me, Laura. I appreciate it.

Victoria Fuller: We appreciate your thoughts and insight, and we'd like to thank all of our listeners for joining us here on *The Employment Law Counselor* podcast, where we try to make sense of the ever-changing world of labor and employment law. If you enjoy this episode, please leave us a five-star review, tell your friends [and] subscribe to the podcast.

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William Raven: and stay compliant.

Victoria Fuller: Thanks, Will. Have a great one everyone. [00:45:00]

Laura Corvo: Thanks everyone.

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