



Workforce Reductions: How to Implement a Layoff Effectively and Legally

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Introduction



Ensuring an Appropriate Business Justification

- **Macro and Micro Economic Issues**
- **Reorganizing/Workforce Restructuring**
 - Open Positions
 - Permanence Requirements
- **Sale or Investment**
 - Consistent Timing
- **Leadership Changes**



Implementing a Legally-Compliant Selection Process

- **Identify Legitimate Non-Discriminatory Goals**
 - Headcount
 - Positions
 - Seniority
 - Performance
- **Problematic Criteria**
 - Compensation Level
 - Leave Status
- **Decisionmaker Selection**



Minimizing Legal Claims via a Disparate Impact Analysis





Why conduct an adverse impact analysis?

- **Disparities in layoff rates between demographic groups involves legal risk, especially if those differences are large enough to be statistically significant (i.e., unlikely to be associated with a random occurrence).**
- **For large organizations, the statistical disparities may not be evident within each of the decision-making units. They are only evident when all the layoff decisions are combined (aggregated).**
- **An adverse impact analysis conducted in “real-time” allows for the opportunity to correct any statistical disparities before those decisions are finalized.**



Standard Adverse Impact Methodology

- 1. The initial analysis is conducted for each “decision-making unit” (DMU) in which RIFs occurred.**

For example, if RIFs were decided at the department-level, then a separate analysis is conducted for each department with at least 1 RIF.

- 2. Within each DMU, compute the percent of employees in each demographic group (females, Latinos, employees ages 40+, etc.).**
- 3. Among the employees who were RIFed from each DMU, compute:**
 - *Total number of RIFs (regardless of gender, race, age)*
 - *Total number of Female RIFs, total number of Latino RIFs, etc.*



Standard Adverse Impact Methodology - Continued

- 4. Calculate the expected number of RIFs in each demographic group as follows:**

*Expected Female RIFs = Total # of RIFs * % of Employees in DMU that are female*

*For example, in a Department with 100 employees (40 females) with 5 RIFs, the expected number of female RIFs is 2. $5 \text{ RIFs} * 40\% = 2 \text{ female RIFs}$.*

- 5. Compare the actual number of RIFs with the expected number of RIFs for each demographic group. If there is a difference, determine if it is large enough to be statistically significant.**
- 6. Summarize (aggregate) results to higher level(s) of the organization.**



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Preliminary and Subject to Change

Analysis of Terminations by Job Function
Female vs Male
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Sample Employer, Inc.
February 28, 2023

| Job Function | Number of Employees | Number of Female Employees | Representation Rate | Number of Terminations | Actual Number of Female Terminations | Predicted Number of Female Terminations | Difference | Number of Standard Deviations | Fisher's Exact Probability of Chance Occurrence | Adverse Impact Ratio | Number of Protected/Comparator Substitutions to 1.50 NSD |
|--|---------------------|----------------------------|---------------------|------------------------|--------------------------------------|---|------------|-------------------------------|---|----------------------|--|
| OVERALL | 525 | 233 | 44.31% | 280 | 140 | 124.1 | 15.9 | -3.09 | 0.00 | 79.79% | -9 |
| <u>Analysis by Job Function</u> | | | | | | | | | | | |
| Finance | 156 | 55 | 35.26% | 70 | 29 | 24.7 | 4.3 | -1.45 | 0.18 | 76.99% | --- |
| Marketing | 243 | 113 | 46.50% | 178 | 89 | 82.8 | 6.2 | -1.81 | 0.08 | 86.92% | --- |
| Operations | 38 | 19 | 50.00% | 5 | 3 | 2.5 | 0.5 | -0.47 | 1.00 | 66.67% | --- |
| Sales | 88 | 46 | 52.27% | 27 | 19 | 14.1 | 4.9 | -2.25 | 0.04 | 46.12% | -2 |





Commonly Asked Questions

- **When measuring adverse impact among race/ethnicity groups, is it better to compare the RIF rate of a group (e.g., Latinos) to white employees only? Or should it be compared to all other employees (non-Latinos)?**
- **I've heard that the formula that computes the number of standard deviations isn't appropriate for smaller DMUs. Are there other alternatives to measure statistical significance?**
- **The layoff process used at our company used other factors to determine RIFs, such as tenure and performance, but the standard methodology doesn't account for that. Is there a different methodology?**



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Analysis of Terminations by Job Function
Asian vs White
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February 28, 2023

| Job Function | Number of Employees | Number of Asian Employees | Representation Rate | Number of Terminations | Actual Number of Asian Terminations | Predicted Number of Asian Terminations | Difference | Number of Standard Deviations | Fisher's Exact Probability of Chance Occurrence | Adverse Impact Ratio | Number of Protected/Comparator Substitutions to 1.50 NSD |
|--|---------------------|---------------------------|---------------------|------------------------|-------------------------------------|--|------------|-------------------------------|---|----------------------|--|
| OVERALL | 360 | 151 | 43.41% | 185 | 89 | 80.3 | 8.7 | -2.09 | 0.04 | 77.93% | -3 |
| <u>Analysis by Job Function</u> | | | | | | | | | | | |
| Finance | 105 | 66 | 62.86% | 46 | 34 | 28.9 | 5.1 | -2.06 | 0.04 | 59.73% | -2 |
| Marketing | 169 | 67 | 39.64% | 118 | 48 | 46.8 | 1.2 | -0.42 | 0.73 | 95.79% | --- |
| Operations | 25 | 4 | 16.00% | 3 | 2 | 0.5 | 1.5 | -2.50 | 0.06 | 9.52% | -1 |
| Sales | 61 | 14 | 22.95% | 18 | 5 | 4.1 | 0.9 | -0.58 | 0.74 | 77.45% | --- |





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Analysis of Terminations by Job Function

Asian vs All Others
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Sample Employer, Inc.
February 28, 2023

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| Job Function | Number of Employees | Number of Asian Employees | Representation Rate | Number of Terminations | Actual Number of Asian Terminations | Predicted Number of Asian Terminations | Difference | Number of Standard Deviations | Fisher's Exact Probability of Chance Occurrence | Adverse Impact Ratio | Number of Protected/Comparator Substitutions to 1.50 NSD |
|--|---------------------|---------------------------|---------------------|------------------------|-------------------------------------|--|------------|-------------------------------|---|----------------------|--|
| OVERALL | 533 | 151 | 29.37% | 283 | 89 | 83.1 | 5.9 | -1.25 | 0.24 | 86.16% | --- |
| <u>Analysis by Job Function</u> | | | | | | | | | | | |
| Finance | 162 | 66 | 40.74% | 72 | 34 | 29.3 | 4.7 | -1.50 | 0.15 | 76.84% | --- |
| Marketing | 245 | 67 | 27.35% | 179 | 48 | 49.0 | -1.0 | 0.31 | 0.75 | 102.73% | --- |
| Operations | 38 | 4 | 10.53% | 5 | 2 | 0.5 | 1.5 | -2.27 | 0.08 | 17.65% | -1 |
| Sales | 88 | 14 | 15.91% | 27 | 5 | 4.3 | 0.7 | -0.44 | 0.75 | 83.24% | --- |





Regression-Based RIF Analysis

- **Statistical models can be constructed to determine if there are statistically significant differences associated with gender, race, or age regarding the probability that an employee is selected for a RIF.**
 - These models calculate the probability differences after accounting for other factors that are included in the model, such as the employee's years of service, performance ratings, department, etc.
- **There are a few drawbacks of adopting a regression-based framework:**
 - Regression-based analyses require larger number of employees to conduct a viable analysis than the standard methodology.
 - The control factors in a regression model are implicitly assumed to be legitimate and “untainted” factors.
 - The use of some factors (e.g., employee's pay) may be problematic in California, especially when evaluating disparate impact for older employees.



Determining How Much Advance Notice to Give / Timing



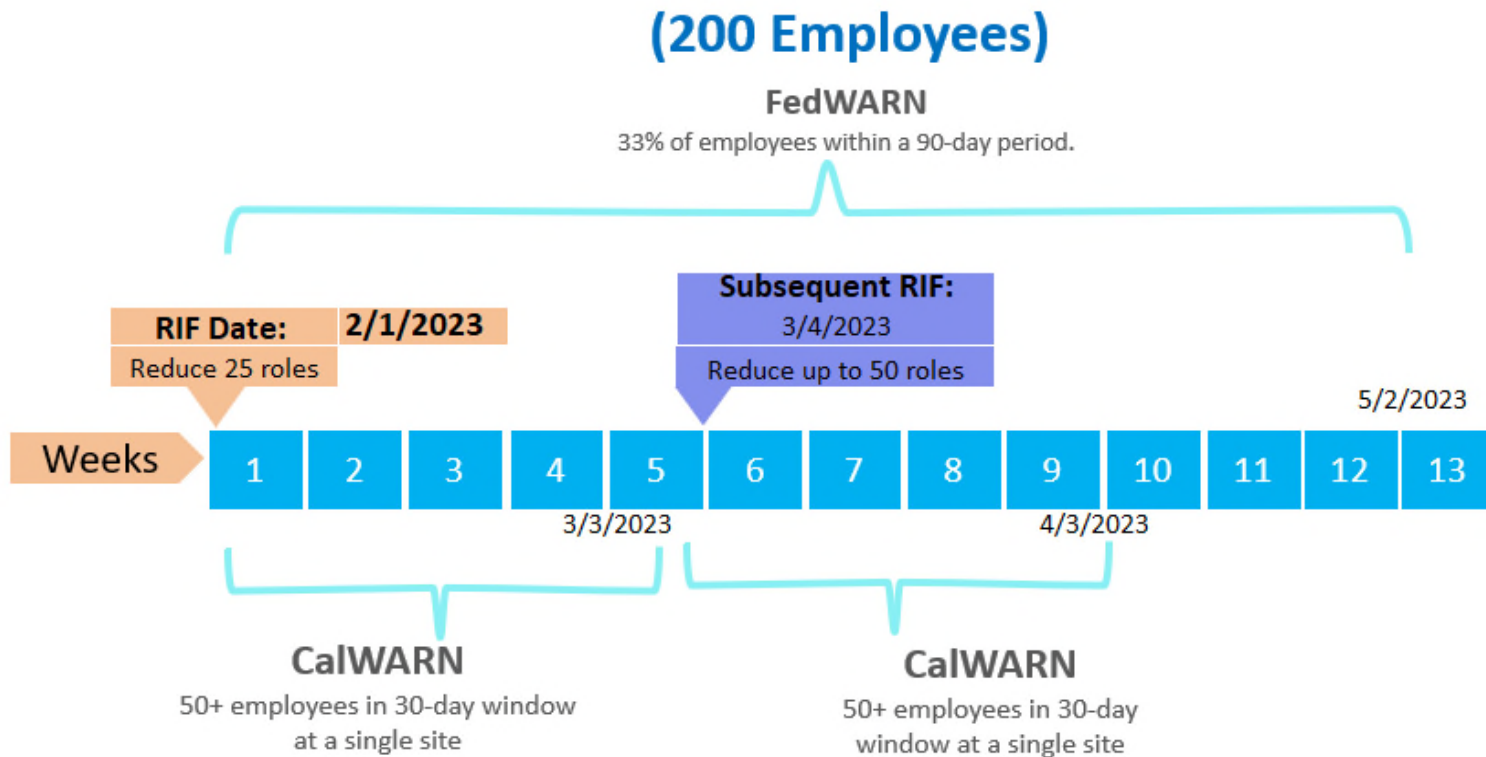


WARN 60-Day Notice – Triggering Event

| FedWARN | CalWARN |
|--|---|
| 100 > employees (excluding part-time) | 75 > more employees |
| A layoff at a single job site during any 30-day period that affects (1) at least 33% of the total full-time employees at the site who comprise at least 50 full-time employees, or (2) at least 500 full-time employees. OR Separate layoffs at a single job site within a 90-day period, and when aggregated affects more than 33% of the total full-time employees at the site and comprises 50 or more full-time employees. | A layoff of at least 50 employees during any 30-day period due to lack of work or lack of funds at a single site. |



WARN Eligibility Timeline





WARN Notice – Requirements

| FedWARN | CalWARN |
|--|---|
| <p>Address to:</p> <ul style="list-style-type: none">• Affected employee;• State dislocated worker unit; and• The chief elected official of the local government within which the layoff occurred. | <p>Address to:</p> <ul style="list-style-type: none">• Affected employee;• EDD;• Local Workforce Investment Board; and• Chief elected official of each city and county government within which layoff occurred. |
| <p>Notice to Employee – (1) permanent or temporary layoff; (2) expected date of layoff and when employee will be separated; (3) whether bumping rights exist; and (4) contact information of company official.</p> <p>Notice to State/Local Government – (1) all of the above; (2) name and address of job site; and (3) job titles of affected positions and the number of affected employees in each job classification.</p> | |



Arriving at the Appropriate Level of Severance Benefits

- **Past Practice**
- **Treating Similar Employees Similarly**



Creating a Severance Agreement That Will Comply with All Jurisdictions Where Impacted Employees Work





Separation Agreements

- **Acknowledgement of Receipt of All Entitled Wages**
- **What the Employee is Getting**
- **Release of Claims** – Federal and state statutes; Cal. Civ. Code § 1542
- **Consideration Period** – 5 days (<40 CA employees); 45 days (>40 employees)
- **Confidentiality** – Cal. Civ. Code § 1001
- **Non-disparagement** – Cal. Civ. Code § 1001
- **Savings Clause**



Facing challenges when laying off remote employees





Effective messaging to all key stakeholders



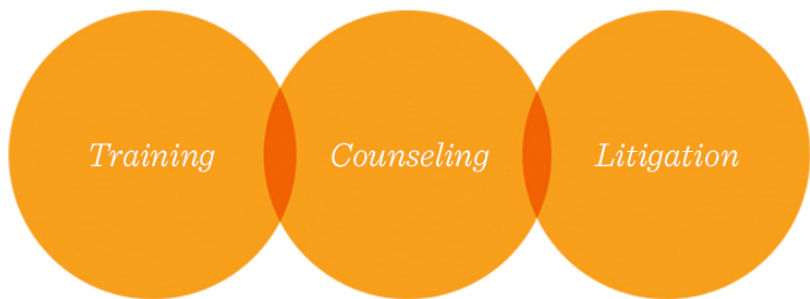


Conclusion



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