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Plant Closings and Reductions in Force

Margaret Hannon

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5 Plant Closings and Reductions in Force

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I. [5.1] SCOPE OF CHAPTER

This chapter examines the effect of federal discrimination laws on permanent layoffs caused by plant closings and reductions in force (RIFs) and discusses the federal Worker Adjustment and Retraining Notification Act (WARN Act), Pub.L. No. 100-379, 102 Stat. 890 (1988), and the Illinois Worker Adjustment and Retraining Notification Act (Illinois WARN Act), 820 ILCS 65/1, *et seq*. This chapter examines cases in which RIFs have been challenged as violating an employee's rights under federal age discrimination law, the legal standards applied by the courts in reviewing such challenges, and some particular problems that have arisen in the context of company cost-cutting decisions. Finally, this chapter outlines practical suggestions and considerations for RIFs, including the use of performance appraisals, waivers and releases, and early retirement incentives. This chapter does not consider issues that might arise in a unionized setting in which the strictures of a collective-bargaining agreement and the National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935), might limit or impede the employer's decision-making discretion.

II. PLANT CLOSINGS AND REDUCTIONS IN FORCE

A. [5.2] In General

Many organizations, at one time or another, are faced with the need to lay off employees for lack of work. Some layoffs are temporary and are expected by employees because of the nature of their jobs. These can be planned for and may not be serious. When a change in operations or a decline in business necessitates permanent layoffs, however, the problem is more difficult.

B. [5.3] Plant Closings

Plant closings are principally the consequence of larger adjustments in the economy and in the life of particular businesses. In a free market economy, there is a constant shift of capital with companies merging, consolidating, and automating. In a dynamic free market economic setting, plant closings are as basic a part of the process as plant openings.

In 1988, Congress passed federal plant-closing legislation, the Worker Adjustment and Retraining Notification Act (discussed in §§5.4 – 5.12 below). In addition, numerous states, including Illinois, have adopted plant-closing legislation. The Illinois Worker Adjustment and Retraining Notification Act (see §5.13 below) took effect January 1, 2005. Other states that have enacted such legislation include:

State	Legislation	State	Legislation
California	Cal.Lab. Code §§1400 – 1408	Minnesota	Minn.Stat. §§116L.17, 116L.976
Connecticut	Conn.Gen.Stat. §§31-51n, 31-51*o*	Nevada	Nev.Admin. Code §§284.076, 284.626, 284.630 (public employees only); §§613.800 – 613.854 (expires August 31, 2022, or the date on which the Governor terminates the March 2020 Declaration of Emergency for COVID-19)
Georgia	Ga.Comp.R. & Regs. 300-2-4-.01(1)	New Hampshire	N.H.Rev.Stat.Ann. §§275-F:1 through 275-F:12; §282-A:45-a
Hawaii	Haw.Rev.Stat. §§394B-1 through 394B-13	New Jersey	N.J.Stat.Ann. §§34:21-1 through 34:21-7
Iowa	Iowa Code Ann. §§84C.1 – 84C.5	New York	N.Y.Lab. Law §§835 – 849 (McKinney)
Kansas	Kan.Stat.Ann. §44-616	Ohio	Ohio Rev. Code Ann. §4141.28(c)
Maine	Me.Rev.Stat.Ann. tit. 26, §625-B	Oregon	Or.Rev.Stat. §§285A.510 – 285A.522
Maryland	Md.Ann. Code, Lab. & Empl. §§11-201, 11-301 through 11-306	Tennessee	Tenn. Code Ann. §§50-1-601 through 50-1-604
Massachusetts	Mass.Gen. Laws ch. 149, §§179B, 182; ch. 151A, §§71A – 71H	Vermont	Vt.Stat.Ann. tit. 21, §§411-418
Michigan	Mich.Comp. Laws §§450.731 – 450.736	Wisconsin	Wis.Stat. §109.07

Some of these laws do not impose obligations distinguishable from the federal WARN Act. However, because some have different requirements, employers must ensure that they comply with any applicable state laws. Employers should also be aware of any applicable notice requirements imposed by cities or other municipalities. See, *e.g.,* Philadelphia Code, §§9-1501 through 9-1504 (imposing notice requirement for group layoffs in the City of Philadelphia); D.C. Code §§32-101 through 32-103 (providing a right to reinstatement for workers in covered industries displaced because of COVID-19).

Because all employees are typically laid off during a plant closing, a full plant closing seldom gives rise to claims of discrimination. If, however, the employer decides to retain or relocate some, but not all, of the laid-off employees, the manner in which the employees to be retained or relocated are selected could create the basis for a claim of discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), Pub.L. No. 88-352, Title VII, 78 Stat. 253; the Age Discrimination in Employment Act of 1967 (ADEA), Pub.L. No. 90-202, 81 Stat. 602; the Americans with Disabilities Act of 1990 (ADA), Pub.L. No. 101-336, 104 Stat. 327; Chapter 21 of Title 42 of the United States Code, 42 U.S.C. §1981, *et seq.;* or other federal, state, and local antidiscrimination statutes. In selecting employees to be retained or relocated, the employer must take steps to ensure that the decision-making process is (1) neutral with respect to the employees' race, sex, disability, age, and other protected characteristics and (2) based on performance-related considerations or other neutral criteria. See §5.25 below for a discussion of performance appraisals. Discrimination concerns may also arise in connection with a decision to reopen the plant at some later date.

C. [5.4] Federal Worker Adjustment and Retraining Notification Act

Congress enacted the Worker Adjustment and Retraining Notification Act on August 4, 1988. The U.S. Department of Labor (USDOL) subsequently promulgated relatively detailed regulations (see 20 C.F.R. §§639.1 – 639.10), which courts have relied on to guide their decisions. *Rowan v. Chicago Housing Authority,* 149 F.Supp.2d 390, 392 (N.D.Ill. 2001). Despite predictions that the statute and regulations would result in a flood of litigation, they have not. Compliance has been readily achievable and forthcoming by most covered employers.

The WARN Act requires employers to provide affected employees or their bargaining representatives and certain government officials with 60 days' advance notice of plant closings or mass layoffs that will result in particular threshold levels of lost employment. 29 U.S.C. §2102.

1. [5.5] Employers Subject to the Worker Adjustment and Retraining Notification Act

The notice requirements under the Worker Adjustment and Retraining Notification Act are applicable to any business enterprise employing (a) 100 or more employees, excluding part-time employees, or (b) 100 or more full-time or part-time employees who, in the aggregate, work at least 4,000 hours per week, excluding overtime hours. 29 U.S.C. §2101(a)(1).

Although the WARN Act's definition of "employer" does not expressly include governmental entities, the Department of Labor's position is that such entities are covered by the WARN Act when they take part in a commercial or industrial enterprise. 20 C.F.R. §639.3. For example, the Chicago Housing Authority (CHA) is covered by the WARN Act. *Castro v. Chicago Housing Authority,* 360 F.3d 721 (7th Cir. 2004). In *Castro,* the Seventh Circuit held that quasi-public entities are employers and subject to the WARN notice requirements if they (a) engage in business and (b) are separately organized from the regular government. 360 F.3d at 729. The Seventh Circuit found that the CHA was an employer as defined by the WARN Act because it engaged in business separately from the City of Chicago. Accordingly, the two and one-half weeks' notice that the CHA gave to security personnel was insufficient, and the CHA was required to give 60 days' notice of termination under the Act. 360 F.3d at 724.

Under the WARN regulations, independent contractors and subsidiaries that are wholly owned by a parent company may be treated as "separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent." 20 C.F.R. §639.3(a)(2). The regulations direct that the following factors be considered in making this determination:

a. common ownership;

b. common directors and/or officers;

c. de facto exercise of control;

d. unity of personnel policies emanating from a common source; and

e. the dependency of operations. *Id.*

These factors closely resemble, but are not identical to, the "single employer" or "integrated enterprise" test that is frequently used in labor and employment law. *Pearson v. Component Technology Corp.,* 247 F.3d 471, 477 (3d Cir. 2001).

The USDOL has also stated that jurisprudence under the WARN Act should not deviate from existing law used to determine liability for affiliated corporations. 54 Fed.Reg. 16,042 (Apr. 20, 1989). Not surprisingly, the tension between existing law and the USDOL factors has led to confusion among courts as to the proper standard, and courts have applied several different tests to determine liability. *See Pearson, supra.*

For example, some courts apply three different tests to determine whether parent and grandparent corporations could be held liable for the debts of a subsidiary: state corporate law; the integrated-enterprise/single-employer test; and the USDOL factors. *Local 397, International Union of Electronic, Electrical Salaried Machine & Furniture Workers, AFL-CIO v. Midwest Fasteners, Inc.,* 779 F.Supp. 788, 792 (D.N.J. 1992). In *Local 397,* the court concluded that the corporations were separate under the state law alter-ego analysis but identical under the integrated-enterprise/single-employer analysis and the USDOL factors. 779 F.Supp. at 796, 798 – 799. The court ultimately concluded that because the WARN Act was enacted to protect workers, wrongdoers should not escape liability merely because corporate formalities were observed. 779 F.Supp. at 800. The court thus held that the outcomes of the integrated enterprise test and the USDOL factors were controlling. *Id. See also United Paperworkers International Union, AFL-CIO, CLC v. Alden Corrugated Container Corp.,* 901 F.Supp. 426 (D.Mass. 1995) (applying state corporate law, the integrated-enterprise/single-employer test, and the USDOL factors).

In contrast, other courts have rejected the application of the integrated-enterprise/single-employer test and the USDOL factors. *Wholesale & Retail Food Distribution Local 63 v. Santa Fe Terminal Services, Inc.,* 826 F.Supp. 326 (C.D.Cal. 1993). In *Santa Fe Terminal Services,* the court applied state corporate law and the USDOL factors. Relying on California corporate law, the court held that the railroad and its subsidiary did not constitute a single employer for WARN purposes despite the analysis under the USDOL factors, which found common ownership, management, and benefit programs when operations, interests, and labor-related functions were separate. 826 F.Supp. at 334 – 335.

Some courts have rejected "[t]he current trend toward applying more than one test for affiliated corporate liability [as] manifestly unworkable" and determined that the USDOL test is most appropriate for determining liability. *Pearson, supra,* 247 F.3d at 489. In *Pearson,* the Third Circuit applied the USDOL test, reasoning that the multiple-test approach generated considerable uncertainty for parties affected by the WARN Act and that state law veil-piercing standards themselves might generate inconsistency. *Id.* The court also indicated that in determining whether two or more corporations constitute a single employer, courts should consider the factors listed in the regulation, in addition to other indicia of corporate "sameness," "such as nonfunctioning of officers and directors, gross undercapitalization, and other circumstances that demonstrate a lack of an arm's-length relationship between the companies." 247 F.3d at 491. *See also Pennington v. Fluor Corp.,* 19 F.4th 589 (4th Cir. 2021) (following *Pearson* and applying USDOL factors to determine whether companies constituted single employer); *In re APA Transport Corp.,* 541 F.3d 233, 243 (3d Cir. 2008) (same); *Cleary v. American Capital Ltd.,* 59 F.Supp.3d 249 (D.Mass. 2014) (same).

Similarly, lenders can be subject to the WARN Act under certain circumstances. The Second, Sixth, Eight, and Ninth Circuits have held that a secured creditor that asserts control over a delinquent debtor's business may become an employer for WARN purposes. *See Coppola v. Bear Stearns & Co.,* 499 F.3d 144 (2d Cir. 2007); *Smith v. Ajax Magnathermic Corp.,* 144 Fed.Appx. 482, 485 (6th Cir. 2005); *Pearson, supra; Adams v. Erwin Weller Co.,* 87 F.3d 269 (8th Cir. 1996); *Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572, International Brotherhood of Teamsters, AFL-CIO v. Weslock Corp.,* 66 F.3d 241 (9th Cir. 1995). These circuits have focused on an assessment of whether the lender's actions were typical of a secured lender. The WARN Act will apply only if the secured creditor operates the debtor's asset as an ongoing commercial business enterprise. *Adams, supra,* 87 F.3d at 272 ("Only when a lender becomes so entangled with its borrower that it has assumed responsibility for the overall management of the borrower's business will the degree of control necessary to support employer responsibility under WARN be achieved."); *Weslock Corp., supra,* 66 F.3d at 244. If the creditor merely exercises financial control, or the degree of control necessary to preserve the business asset for liquidation, the creditor is not an employer subject to the WARN Act. 66 F.3d at 245. The Third Circuit, however, has applied a slightly different test. In *Pearson, supra,* the court declined to focus on whether behavior is typical of a secured lender, noting that typical lender behavior is a mutable concept. The court concluded that while courts should "attend to the customary relationship between lender and borrower . . . they should also make a functional assessment of the amount of control involved." 247 F.3d at 495. *See also Walsh v. Richard K. Diamond, Chapter 7 Trustee (In re Century City Doctors Hospital, LLC),* BAP No. CC-09-1235-MkJaD, 2010 WL 6452903 (B.A.P. 9th Cir. 2010) (text available in Westlaw) (following *Weslock Corp., supra,* and determining that Chapter 7 bankruptcy trustee qualified as "employer"). *But see Thielman v. MF Global Holdings Ltd. (In re MF Global Holdings Ltd.),* 481 B.R. 268, 282 – 283 (Bankr. S.D.N.Y. 2012) (applying "liquidating fiduciary" exception and finding that Securities Investor Protection Act of 1970 trustee was not "employer" because trustee's sole responsibility was to liquidate business).

2. [5.6] Employees Covered by the Worker Adjustment and Retraining Notification Act

The regulations under the Worker Adjustment and Retraining Notification Act provide that workers on either temporary layoff or leave who have a "reasonable expectation of recall" should be considered employees for the purpose of calculating the requisite number of employees. 20 C.F.R. §639.3(a)(1). An employee has a reasonable expectation of recall when the employee understands, "through notification or through industry practice," that their employment has been temporarily interrupted and the employee "will be recalled to the same or to a similar job." *Id.* In *Damron v. Rob Fork Mining Corp.,* 945 F.2d 121, 124 (6th Cir. 1991), the Sixth Circuit largely adopted the National Labor Relations Board's test for determining whether a laid-off employee has a reasonable expectation of recall: (a) the past experience of the employer; (b) the employer's future plans; (c) the circumstances of the layoff; (d) the expected length of the layoff; and (e) the industry practice. *See also Bradley v. Sequoyah Fuels Corp.,* 847 F.Supp. 863, 868 (E.D.Okla. 1994) (same); *Bledsoe v. Emery Worldwide Airlines, Inc.,* 635 F.3d 836, 848 (6th Cir. 2011) (reaffirming *Damron*'s definition of "affected employee" and criteria for determining reasonableness of expectation of recall).

In *Teamsters Local 838 v. Laidlaw Transit, Inc.,* 156 F.3d 854 (8th Cir. 1998), the Eighth Circuit considered whether temporarily laid-off school bus drivers who were ultimately terminated when the employer closed a facility were employees with a reasonable expectation of recall. The court held that the employment loss triggering a WARN duty to provide notice did not arise until the ultimate plant closing because only then did these employees lose an expectation of recall. 156 F.3d at 856. *See also Oil, Chemical & Atomic Workers International Union, Local 7-629, AFL-CIO v. RMI Titanium Co.,* 199 F.3d 881, 885 (6th Cir. 2000) (holding that employees who were temporarily recalled from layoff to cover for employees participating in voluntary layoff program did not suffer employment loss because action did not involve elimination of any positions); *Sanders v. Kohler Co.,* 641 F.3d 290, 294 (8th Cir. 2011) (finding that "employees who are fired but replaced are not part of a reduction in force and do not count as part of the aggregate number of employee layoffs that must be met to satisfy the numerosity thresholds").

Seasonal employees are also covered by the WARN Act. *Marques v. Telles Ranch, Inc.,* 131 F.3d 1331, 1332 (9th Cir. 1997); *Kalwaytis v. Preferred Meal Systems, Inc.,* 78 F.3d 117, 118 (3d Cir. 1996). In *Marques, supra,* the Ninth Circuit ruled that seasonal workers may suffer an employment loss subject to WARN notice requirements. Seasonal lettuce harvesters received a letter during their layoff period announcing the closing of the employer's lettuce harvesting division. *Id.* The court found that the employment loss occurred on the dates the employees expected to report back to work, not on the date of receipt of the letter. 131 F.3d at 1334. *See also Kalwaytis, supra* (finding that WARN violation period begins at earlier of (a) date employees expected to return to work or (b) date of permanent layoff).

"The WARN Act excludes 'voluntary departure[s]' from its definition of 'employment loss[es]' that trigger its notification requirements." *Ellis v. DHL Express Inc. (USA),* 633 F.3d 522, 526 (7th Cir. 2011) (finding that employees who accepted union-negotiated severance packages "voluntarily departed" from employment even though some employees had already been laid off and were given window of two business days to consider severance package), quoting 29 U.S.C. §2101(a)(6). *But see Collins v. Gee West Seattle LLC,* 631 F.3d 1001, 1006 (9th Cir. 2011) ("Employees' departure because of a business closing, therefore, is generally not voluntary . . . but a consequence of the shutdown and must be considered a loss of employment when determining whether a plant closure has occurred." [Footnote omitted.]).

3. [5.7] When Notice Is Required

Notice is required under the Worker Adjustment and Retraining Notification Act when a plant closing or the "permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment," results in an employment loss for 50 or more employees, excluding part-time employees, at a single site of employment during any

30-day period. 29 U.S.C. §§2101(a)(2), 2102. Note that a plant closing does not have to result in the shutdown of an entire plant or facility. Instead, a plant closing can exist when there is a "permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment." 29 U.S.C. §2101(a)(2). See 29 U.S.C. §2102. For example, the elimination of a production line (or other distinct unit) within a facility may constitute a plant closing if the requisite numbers are met. See 20 C.F.R. §639.3(j).

Additionally, a "mass layoff," defined as "a reduction in force which . . . is not the result of a plant closing," triggers the notice requirement when it results in an employment loss for at least 500 employees at a single site of employment during any 30-day period. 29 U.S.C. §2101(a)(3). See 29 U.S.C. §2102. If a layoff involves fewer than 500 employees, notice is required if at least one third of the employees suffers loss of employment, provided that at least 50 employees are affected. 29 U.S.C. §2101(a)(3). While the statute focuses on a 30-day period for calculating threshold levels of employment loss, an aggregation clause in the statute also provides that closings and layoffs at a single site of employment during any 90-day period affecting two or more groups of employees that individually do not meet the threshold levels of employment loss will trigger WARN notice requirements if the groups meet the threshold levels of employment loss when combined. 29 U.S.C. §2102(d). Of course, in some cases, this aggregation still may not produce the requisite level of employment losses for WARN coverage.

WARN notice must be provided to (a) the chief elected officer of the exclusive representative or bargaining agent of the affected employees if the employees are represented by a union or, if there is no representative, to the affected employees; (b) the state dislocated worker unit; and (c) the chief elected official of local government. 29 U.S.C. §2102(a); 20 C.F.R. §639.6.

Although the WARN Act offers no definition of "single site," according to the regulations, a single site of employment may refer to "either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment." 20 C.F.R. §639.3(i)(1). "Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment." 20 C.F.R. §639.3(i)(3).

Thus, under the regulations, geographic proximity is the primary factor considered in determining what constitutes a single site. 20 C.F.R. §§639.3(i)(1) – 639.3(i)(6). *See also Meadows v. Latshaw Drilling Co.,* 866 F.3d 307 (5th Cir. 2017); *Dwyer v. Galen Hospital Illinois, Inc.,* No. 94 C 544, 1996 WL 111886 (N.D.Ill. Mar. 12, 1996). "Contiguous facilities or those in close geographic proximity are generally single sites of employment and geographically separate facilities are generally separate sites." *Teamsters Local Union 413 v. Driver's, Inc.,* 101 F.3d 1107, 1109 (6th Cir. 1996) (holding that eleven separate trucking terminals, spread over six states, were not single sites under WARN Act). *See also Williams v. Phillips Petroleum Co.,* 23 F.3d 930 (5th Cir. 1994) (holding that two plants located hundreds of miles apart were separate for WARN purposes). Of course, there are times when consolidating sites of employment still will not reach the statutory size threshold, a fatal legal defect in a WARN claim. *See, e.g., Rowan v. Chicago Housing Authority,* 149 F.Supp.2d 390, 393 (N.D.Ill. 2001).

Although geographic proximity is considered the primary factor, it is not necessarily dispositive. As noted in the regulations, noncontiguous facilities may be deemed a single site if there is some connection between the facilities beyond common ownership, such as a regular sharing of staff, equipment, and operational purpose. *See Davis v. Signal International Texas GP, LLC,* 728 F.3d 482 (5th Cir. 2013); *Teamsters Local Union 413, supra,* 101 F.3d at 1110. *Cf. Rifkin v. McDonnell Douglas Corp.,* 78 F.3d 1277, 1280 – 1281 (8th Cir. 1996) (holding that noncontiguous sites were separate for WARN purposes because they only occasionally shared employees, equipment, and personnel files). In addition, facilities in the same geographic area may be considered separate single sites if they have separate management and workforces or produce different products. 20 C.F.R. §639.3(i)(5). *See also Frymire v. Ampex Corp.,* 61 F.3d 757, 766 (10th Cir. 1995) (holding that sites in near-contiguous buildings within same compound were separate despite proximity and some overlap of managerial responsibilities when they had no common employees and produced different products); *International Union, United Mine Workers v. Jim Walter Resources, Inc.,* 6 F.3d 722, 725 – 726 (11th Cir. 1993) (finding employer's four mining sites were separate because three mines were contiguous, two mines were connected underground, and centralized administrative office existed, each mine's management team had real organizational and operational control, and no employees rotated among mines).

The Fifth Circuit, however, has adopted a more particularized test for determining whether separate facilities constitute a single site. *Viator v. Delchamps Inc.,* 109 F.3d 1124 (5th Cir. 1997). The Fifth Circuit held that separate facilities should be treated as a single site of employment only if they meet each of the three factors enumerated in the regulations:

> **1) the separate facilities are in "reasonable geographic proximity" of one another; 2) they are "used for the same purpose"; 3) and they "share the same staff and equipment."** 109 F.3d at 1127, quoting 20 C.F.R. §639.3(i)(3).

In *Viator,* the court found that multiple sites that did not regularly share staff or equipment could not be aggregated to achieve the requisite number of layoffs and subject the employer to WARN liability. The grocery store at issue temporarily transferred 20 percent of its employees to help other shorthanded stores. *Id.* The stores also shared a pressure washer and occasionally exchanged inventory. 109 F.3d at 1127 – 1128. The Fifth Circuit held that these factors were insufficient to establish a single site. *Id. See also Sisney v. Trinidad Drilling, LP,* 231 F.Supp.3d 233 (W.D.Tex. 2017) (finding that multiple sites could not be aggregated to form single site despite shared ownership and management because there was no record of shared common purpose); *Ramos Pena v. New Puerto Rico Marine Management, Inc.,* 84 F.Supp.2d 239 (D.P.R. 1999) (holding that multiple sites could not be aggregated because they were not close geographically and there was no evidence of shared staff or equipment).

The regulations also provide an exception to the general rule requiring geographic proximity for "truly unusual organizational situations." 20 C.F.R. §639.3(i)(8). Applying this exception, the Fifth Circuit has held that two separate facilities constituted a single site when the employees had previously been housed together, continued to perform the same functions, and were separated solely due to space considerations. *See Carpenters District Council of New Orleans & Vicinity v. Dillard Department Stores, Inc.,* 778 F.Supp. 297 (E.D.La. 1991), *aff'd in part, rev'd in part on other grounds,* 15 F.3d 1275, 1290 (5th Cir. 1994). *See also Davis, supra,* 728 F.3d at 486 – 487.

But see McClain v. Laurel Street Art Club, Inc., 106 F.3d 401 (6th Cir. 1997) (text available in Westlaw) (refusing to apply exception in nearly identical circumstances and criticizing Fifth Circuit's rationale); *Likes v. DHL Express,* 25 F.Supp.3d 1352, 1360 n.20 (N.D.Ala. 2014) (declining to apply exception to employees with different primary employers).

To determine a traveling employee's site of employment for purposes of determining the number of employees laid off, the court should first determine whether that employee had a "home base." 20 C.F.R. §639.3(i)(6). If the employee has a home base, that is the site of employment. *See, e.g., Air Line Pilots Association, International v. Pan American Airways Corp.,* No. Civ. 02-593-M, 2004 WL 32942, *2 (D.N.H. Jan. 6, 2004) (determining that flight crew members had home bases that were considered their respective employment sites). *See also Schroeder v. Global Aviation Holdings, Inc. (In re Global Aviation Holdings, Inc.),* 483 B.R. 54, 61 (Bankr. E.D.N.Y. 2012) (finding that "physical connection to a location is essential to a finding that the location is a worker's 'home base' "). Otherwise, the employee's site of employment is "the place from which [their] work is assigned" or the site to which the employee reported. *Air Line Pilots Association, International, supra,* at *2. *But cf. Teamsters Local Union 413, supra,* 101 F.3d at 1110 (holding that truck drivers working out of 11 separate terminals had no common site of employment under 20 C.F.R. §639.3(i)(6) despite fact that managerial and administrative functions were traceable to single centralized location).

4. [5.8] Exceptions to the Notice Requirement

Certain employment losses are exempt from notice requirements under the Worker Adjustment and Retraining Notification Act. In the case of the sale of part or all of an employer's business, the Act establishes that the seller's employees will be considered the purchaser's employees immediately after the effective date of the sale. Thus, no employment loss requiring notice occurs merely by virtue of the sale. *Wiltz v. M/G Transport Services, Inc.,* 128 F.3d 957 (6th Cir. 1997) (holding that sale is not WARN event); *International Alliance of Theatrical & Stage Employees & Moving Picture Machine Operators, AFL-CIO v. Compact Video Services, Inc.,* 50 F.3d 1464, 1468 (9th Cir. 1995) (holding that sale of union business to nonunion entity and resulting modification of employee salaries and benefits is not WARN event). After the effective date of the sale, the responsibility for providing 60 days' notice shifts to the purchaser. 29 U.S.C. §2101(b)(1). *See also Guippone v. BH S & B Holdings LLC,* 681 F.Supp.2d 442 (S.D.N.Y. 2010) (finding that purchaser retained WARN obligations because employees of seller who were retained after sale but terminated one month after purchase were not part-time employees by virtue of working for purchaser for only one month); *Alter v. SCM Office Supplies, Inc.,* 906 F.Supp. 1243 (N.D.Ind. 1995) (concluding that requiring former employees of selling company to reapply for their jobs did not cause employment loss under WARN Act).

When a relocation or consolidation of part or all of an employer's business is the cause of a closing or layoff, no notice is required if, before the closing or layoff,

> **(A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6–month break in employment; or**

(B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6–month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later. *Moore v. Warehouse Club, Inc.,* 992 F.2d 27, 29 – 30 (3d Cir. 1993).

The *Moore* court found that employees who were offered a transfer to a different employment site on the date of the plant closing did not suffer an employment loss and, therefore, should not be counted when determining whether the requisite number of employees suffered an employment loss so as to trigger WARN notice requirements. *See also Palmer v. Reese Bros.,* 160 Fed.Appx. 173 (3d Cir. 2005) (finding that employees who were transferred to other positions at alternative locations did not suffer employment loss); *Martin v. AMR Services Corp.,* 877 F.Supp. 108, 113 (E.D.N.Y. 1995) (holding that 18 employees displaced when employer closed department suffered no employment loss under WARN Act because they were immediately transferred to new positions within company). The Sixth Circuit has held that a defendant employer could not avail itself of the relocation exception, however, when the loss of a major customer caused the employer to close its plant and transfer remaining business to a separate facility. *Saxion v. Titan-C-Manufacturing, Inc.,* 86 F.3d 553, 558 (6th Cir. 1996). The court reasoned that to qualify under the relocation and transfer exception, a plant closing must be the "result of the transfer, not the other way around." *Id. See also Martinez v. Caravan Transportation, Inc.,* 253 F.Supp.2d 403 (E.D.N.Y. 2003) (holding that transportation employees who were immediately given new jobs at same or higher wage when employer sold routes did not suffer WARN employment loss).

The WARN Act also exempts particular closings and layoffs from its notice requirements. For example, if a temporary facility is closed or if the layoff is the result of the completion of a particular project and the affected employees were aware at the time of hiring that their employment was limited to the duration of the facility or undertaking, no notice is required. 29 U.S.C. §2103(1). Notice is similarly unnecessary if the closing or layoff constitutes a strike or lockout not intended to evade the consequences of the WARN Act. 29 U.S.C. §2103(2).

In *Washington v. Aircap Industries Corp.,* 831 F.Supp. 1292, 1293, 1299 (D.S.C. 1993), the court held that a manufacturer of outdoor power equipment was not a temporary facility exempt from WARN requirements under 29 U.S.C. §2103 even though the manufacturer had historically laid off some workers at the start of each summer and rehired them at the end of the summer. After noting that exceptions to the WARN Act must be construed narrowly, the court reasoned that the facility hired workers for indefinite periods rather than for discrete projects with ascertainable completion dates. 831 F.Supp. at 1296 – 1297. Further, although employment at the facility was seasonal, the defendant's contracts were renewable and employment was recurring. 831 F.Supp. at 1297. Finally, the court held that workers did not understand at the time of hire that their employment was temporary, as required by WARN regulations for application of the temporary facility exception. 831 F.Supp. at 1298. The defendant facility failed to show that it had "clearly communicated the allegedly 'temporary' nature of the employment to the employees at the time of hire." *Id.*

Several courts have held that the WARN Act does not apply to government-ordered closings or closings in which both the government and the employer play a role. In *Buck v. Federal Deposit Insurance Corp.,* 75 F.3d 1285 (8th Cir. 1996), the Eighth Circuit held that the Federal Deposit

Insurance Corporation (FDIC) was not subject to WARN requirements when it took over a failing bank. In *Buck,* the FDIC organized a "bridge" or transition bank to purchase the assets and assume the liabilities of two failed banks until those assets could be transferred to a healthy successor bank. The court held that the WARN Act was inapplicable to the FDIC's closure of the bridge bank because imposing notice requirements "could severely hinder the FDIC's ability to resolve bank failures . . . efficiently and expeditiously." 75 F.3d at 1290. Similarly, in *Deveraturda v. Globe Aviation Security Services,* 454 F.3d 1043, 1049 (9th Cir. 2006), the Ninth Circuit held that government-controlled layoffs were not subject to the WARN Act. In *Deveraturda,* the San Jose International Airport hired Globe Airport Security Services, Inc., for its airport security needs. In 2001, as a result of the Aviation and Transportation Security Act, Pub.L. No. 107-71, 115 Stat. 597 (2001), airport security was federalized and private companies were dismissed from such duties. Some terminated employees initiated a class action against the defendant for failure to give 60 days' notice under the WARN Act. The Ninth Circuit found that the WARN Act was not applicable because the layoff was government-ordered and not within the employer's control. The Ninth Circuit compared the government takeover of airport security to the FDIC's bank takeover in *Buck, supra.* 454 F.3d at 1048.

5. [5.9] Reduction of the Notice Period

Under the Worker Adjustment and Retraining Notification Act, three circumstances warrant reduction of the 60-day notice period, though none of these circumstances eliminate the obligation to provide notice. *Newman v. Crane*, 435 F.Supp.3d 834 (N.D.Ill. 2020); *Carroll v. World Marketing Holdings, LLC,* 418 F.Supp.3d 299 (E.D.Wis. 2019).

First, employers may be entitled to the benefit of the "faltering company" exception. If, 60 days before the closing, the employer was actively seeking capital or business that would have avoided or postponed the closing and the employer reasonably and in good faith believed that giving the required notice would have prevented the employer from obtaining the necessary capital or business, then the employer may order the closing or layoff before the end of the 60-day period. 20 C.F.R. §639.9(a). This exception applies only when a layoff is caused by the employer's failure to obtain sufficient capital. *Carpenters District Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc.,* 15 F.3d 1275, 1281 (5th Cir. 1994) (holding that faltering company exception did not apply because reverse triangular merger had directly caused employee layoffs, rather than search for additional capital).

To be eligible for the exception, the employer must be "actively seeking" additional capital as of the time that notice would have been required. *In re APA Transport Corp. Consolidated Litigation,* 541 F.3d 233, 248 (3d Cir. 2008). In *APA,* the Third Circuit found that the faltering company exception did not apply because the defendant employer was not actively seeking financing from a lender. The court reasoned that the employer had not initiated a meeting with the lender during which additional financing was discussed, did not submit a formal request for financing to the lender, and took no steps to secure financing following the meeting. 541 F.3d at 249 – 250. *See also Local 397, International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, AFL-CIO v. Midwest Fasteners, Inc.,* 763 F.Supp. 78 (D.N.J. 1990) (holding that coordinating sale of facility did not constitute actively seeking capital or business within meaning of exceptions to WARN notice requirements).

The second situation in which a reduction of the required notice period is allowed occurs when the closing or layoff is caused by business circumstances that were not reasonably foreseeable at the time notice would have been required or in the event of a natural disaster. 20 C.F.R. §§639.9(b)(1), 639.9(c). There is, however, no per se rule concerning what constitutes unforeseeable business circumstances. *Pena v. American Meat Packing Corp.,* 362 F.3d 418 (7th Cir. 2004). Instead, there should be a case-by-case analysis. 362 F.3d at 421. When determining whether a mass layoff was caused by unforeseeable business circumstances, courts should evaluate whether a similarly situated employer exercising reasonable judgment could have foreseen the circumstances that caused the layoff. *Acevedo v. Heinemann's Bakeries, Inc.,* 619 F.Supp.2d 529, 535 (N.D.Ill. 2008); 20 C.F.R. §639.9(b)(2). Moreover, for the exception to be applicable, the employer must demonstrate that "(1) the circumstance was unforeseeable, and (2) the layoffs were caused by that circumstance." *Gross v. Hale-Halsell Co.,* 554 F.3d 870, 875 (10th Cir. 2009). According to at least one court and the Department of Labor, this exception should not be narrowly construed. *United Steel Workers of America Local 2660 v. United States Steel Corp.,* 683 F.3d 882, 886 (8th Cir. 2012). *See also In re AE Liquidation, Inc.,* 866 F.3d 515, 531 (3d Cir. 2017) ("[A] layoff becomes reasonably foreseeable only when it becomes more likely than not that it will occur.")

In *Roquet v. Arthur Andersen LLP,* 398 F.3d 585, 587 – 588 (7th Cir. 2005), the Seventh Circuit found that the defendant satisfied the unforeseeable business circumstances exception when the defendant company was indicted by the government after an investigation and was forced to make mass layoffs. The Seventh Circuit held that the company reacted to the government investigation as a reasonable employer would, by fighting to save the company while waiting to see if it was indicted. 398 F.3d at 589. *See also Pennington v. Fluor Corp.,* 19 F.4th 589 (4th Cir. 2021) (finding that employer did not violate WARN Act notice requirement when closure was due to unforeseeable business exception resulting from client's abrupt plant shutdown); *In re AE Liquidation, Inc., supra* (applying unforeseeable business circumstances exception when employer failed to obtain financing necessary to finalize sale); *Watson v. Michigan Industrial Holdings, Inc.,* 311 F.3d 760 (6th Cir. 2002) (finding unforeseeable business circumstances exception applied when company suddenly and unexpectedly lost supply contract); *Hotel Employees & Restaurant Employees International Union Local 54 v. Elsinore Shore Associates,* 173 F.3d 175 (3d Cir. 1999) (applying unforeseeable business circumstances exception when government agency refused to renew casino's license in unprecedented decision); *Jurcev v. Central Community Hospital,* 7 F.3d 618 (7th Cir. 1993) (ruling that hospital's loss of primary funding source constituted unforeseeable business circumstance justifying reduction in notice period); *United Steel Workers of America Local 2660, supra* (applying unforeseeable business circumstances exception based on unforeseeability of 2008 economic crisis); *Pearce v. Faurecia Exhaust Systems, Inc.,* No. 3:10-cv-282, 2012 WL 2884748 (S.D. Ohio July 13, 2012) (applying unforeseeable business circumstances exception when layoff was caused by Chrysler's sudden bankruptcy).

Similarly, in *Bradley v. Sequoyah Fuels Corp.,* 847 F.Supp. 863 (E.D.Okla. 1994), the court held that the unforeseeable business circumstances exception applied when the unexpected release of nitrogen dioxide led to the defendant's plant closing. *Cf. Calloway v. Caraco Pharmaceutical Laboratories, Ltd.,* 800 F.3d 244 (6th Cir. 2015) (declining to apply unforeseeable business circumstances exception when drug manufacturer's products were seized by Food and Drug Administration (FDA) following several warnings from FDA of violations of FDA regulations);

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, General Truck Drivers, Office, Food & Warehouse Local 952 v. American Delivery Service Co., 50 F.3d 770 (9th Cir. 1995) (finding that fact that employer could have, but did not, negotiate provision in contract requiring customer to provide 60-day cancellation notice did not compel finding that unforeseeable business circumstances exception was unavailable to employer); *United Paperworkers International Union, AFL-CIO, CLC v. Alden Corrugated Container Corp.,* 901 F.Supp. 426, 443 (D.Mass. 1995) (holding that bank's decision to call defendant employer's loans and order cessation of operations was not unforeseen when such events were "culmination of . . . continuing, and admittedly worsening, financial devastation"); *Czyzewski v. Jevic Transportation, Inc.* (*In re Jevic Holding Corp.),* 496 B.R. 151 (Bankr. D.Del. 2013) (declining to apply unforeseeable business circumstances exception after bank's decision not to extend forbearance because business's failure was not just possible but probable).

Finally, reduction of the notice period is permitted in the event of a natural disaster. 20 C.F.R. §639.9(c). Natural disasters include "[f]loods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature." 20 C.F.R. §639.9(c)(1). At least one court has held that the COVID-19 pandemic qualifies as a natural disaster under the WARN Act. *Easom v. US Well Services, Inc.,* 527 F.Supp.3d 898 (S.D.Tex. 2021) (appeal pending). To qualify for the natural disaster exception, the employer must demonstrate that the plant closing or mass layoff is "a direct result of a natural disaster." 20 C.F.R. §639.9(c)(2). The regulations note that "[w]here a plant closing or mass layoff occurs as an *indirect* result of a natural disaster, the exception does not apply but the 'unforeseeable business circumstance' exception . . . may be applicable." [Emphasis added.] 20 C.F.R. §639.9(c)(4).

Employers should note that, to rely on any of the exceptions, employers must "give as much notice as is practicable." 29 U.S.C. §2102(b)(3); *Newman v. Crane, Heyman, Simon, Welch, & Clar,* 435 F.Supp.3d 834 (N.D.Ill. 2020); *Carroll v. World Marketing Holdings, LLC,* 418 F.Supp.3d 299 (E.D.Wis. 2019). *But see Richards v. Advanced Accessory Systems, LLC (In re Advanced Accessory Systems, LLC),* 443 B.R. 756, 767 (Bankr. E.D.Mich. 2011) ("The statute does not require that an employer provide sixty days written notice as a pre-condition to asserting one of the defenses set forth in the Act.").

When notice is provided, employers "shall give a brief statement of the basis for reducing the notification period." 29 U.S.C. §2102(b)(3). This brief statement should identify the underlying factual events that necessitated a shortened notice period and set forth reasonably specific facts rather than conclusory assertions. *See Alarcon v. Keller Industries, Inc.,* 27 F.3d 386, 389 (9th Cir. 1994) (noting that "a company's statement of its basis for a shortened notice period should set forth the underlying factual events which led to the shortened period"); *Grimmer v. Lord Day & Lord,* 937 F.Supp. 255 (S.D.N.Y. 1996) (finding notice of closing inadequate when notice contained conclusory assertion that closing arose from unforeseeable business circumstances); *Acevedo, supra,* 619 F.Supp.2d at 536 – 537 (finding that notice "may well fail to meet the WARN Act's notice requirements" because it did not explain basis for reduction of notice period); *Ien v. TransCare Corp. (In re TransCare Corp.),* 611 B.R. 160 (Bankr. S.D.N.Y. 2020) (finding that contradictory and confusing notices that failed to state date of layoff, which employees would be terminated, and who could answer questions was insufficient to satisfy even shortened notice requirements).

6. [5.10] Employees to Whom Notice Must Be Given

An employer is obligated to provide notice of a plant closing or mass layoff to all affected employees. 29 U.S.C. §2102(a). Under the Worker Adjustment and Retraining Notification Act, both part-time employees and full-time employees may be affected employees entitled to notice. 20 C.F.R. §639.6. In addition, several courts have held that employees on temporary layoff should also be considered affected employees entitled to the same notice under the WARN Act as employees working on the date of termination. *See Kildea v. Electro Wire Products, Inc.,* 792 F.Supp. 1046 (E.D.Mich. 1992) (finding that employees on layoff with reasonable expectation of recall are entitled to notice), *aff'd*, 144 F.3d 400 (6th Cir. 1998). *See also Damron v. Rob Fork Mining Corp.,* 945 F.2d 121, 123 – 124 (6th Cir. 1991) (considering whether laid-off employees have reasonable expectation of recall under WARN Act and applying National Labor Relations Board's test for determining whether person on layoff is employee under National Labor Relations Act); *Nelson v. Formed Fiber Technologies, Inc.,* 856 F.Supp.2d 235, 241 (D.Me. 2012) (finding that former employee did not suffer "employment loss" when he accepted another position prior to being recalled from layoff despite his subjective expectation that layoff would exceed six months); *Bradley v. Sequoyah Fuels Corp.,* 847 F.Supp. 863, 868 – 869 (E.D.Okla. 1994) (holding that contract employee who obtained job at closed plant through temporary agency was not affected employee entitled to seek relief under WARN Act); *Goodman v. Mr. Goodbuys of New York Corp. (In re Mr. Goodbuys of New York Corp.),* 164 B.R. 24, 29 (Bankr. E.D.N.Y. 1994) (holding that employee terminated more than 90 days before mass layoffs at employer's plant was not affected employee under WARN Act).

7. [5.11] Contents of a Worker Adjustment and Retraining Notification Act Notice

Under the Worker Adjustment and Retraining Notification Act, the notice given to each affected employee must contain, in language understandable to the employee, (a) 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; (b) the expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated; (c) a statement as to whether bumping rights exist; and (d) the name and telephone number of a company official to contact for further information. 20 C.F.R. §639.7. The notice may also include any additional useful information, such as information regarding dislocated worker assistance and, if the planned action is expected to be temporary, the estimated duration. *Id.* Minor errors are not necessarily a basis for finding a violation of the WARN Act. 20 C.F.R. §639.7(a)(4) ("It is not the intent of the regulations, that . . . minor, inadvertent errors are to be the basis for finding a violation of WARN."). *See also Butler v. Fluor Corp.,* 511 F.Supp.3d 688 (D.S.C. 2021) (finding that notice containing e-mail address instead of phone number did not invalidate compliance with WARN Act).

The notice given to each representative of the affected employees must contain (a) the name and address of the employment site where the plant closing or mass layoff will occur; (b) the name and telephone number of a company official to contact for further information; (c) 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; (d) the expected date of the first separation and the anticipated separation schedule; and (e) the job titles of positions to be affected and the names of the workers currently holding affected jobs. Again, the notice may also include any additional useful information, such as information regarding dislocated worker assistance and, if the planned action is expected to be temporary, the estimated duration. 20 C.F.R. §639.7.

Finally, the notices provided to the state dislocated worker unit and to the chief elected official of the unit of local government must contain (a) the name and address of the employment site where the plant closing or mass layoff will occur; (b) the name and telephone number of a company official to contact for further information; (c) 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; (d) the expected date of the first separation and the anticipated separation schedule; (e) the job titles of positions to be affected and the number of affected employees in each job classification; (f) a statement as to whether bumping rights exist; and (g) the name of each union representing affected employees and the name and address of the chief elected officer of each union. Alternatively, the notice to the state dislocated worker unit and the chief elected official may be satisfied by providing a written notice of the name and address of the site involved, the name and telephone number of the company official to contact for further information, the expected date of the first separation, and the number of affected employees. The other information required in the notice must be readily available to the state dislocated worker unit or chief elected official. Failure to have the information readily available will be deemed a failure to provide the required notice. *Id.*

8. [5.12] Cause of Action and Liability Under the Worker Adjustment and Retraining Notification Act

A cause of action under the Worker Adjustment and Retraining Notification Act accrues when there has been an employment loss. 29 U.S.C. §2104(a). In instances of employment termination, such as a plant closing, the termination immediately qualifies as an employment loss. Accordingly, a WARN claim accrues on the date of employment termination. *See Automobile Mechanics' Local No. 701 of International Association of Machinists & Aerospace Workers, AFL-CIO v. Santa Fe Terminal Services, Inc.,* 830 F.Supp. 432 (N.D.Ill. 1993); *Finkler v. Elsinore Shore Associates,* 725 F.Supp. 828 (D.N.J. 1989).

Some disagreement exists among the courts with respect to when a cause of action accrues based on a mass layoff. In *Automobile Mechanics' Local No. 701, supra,* the court ruled that a WARN cause of action based on a mass layoff does not accrue until after the layoff has exceeded six months. In so ruling, the court relied on 29 U.S.C. §2101(a)(6), which defines "employment loss" as a layoff exceeding six months. The court concluded that because an employment loss is a necessary element of a damages claim under the WARN Act, a claim based on a layoff cannot accrue until the employees have been laid off for more than six months. 830 F.Supp. at 434. *But see Finkler, supra,* 725 F.Supp. at 831 (finding that as long as mass layoff is reasonably expected to last more than six months and employees may reasonably be expected to experience employment loss as consequence, employees may immediately institute action under WARN Act).

The WARN Act does not contain an express statute of limitations. The U.S. Supreme Court, however, has held that state law provides the proper source of the limitations period for civil actions brought to enforce the WARN Act. *North Star Steel Co. v. Thomas,* 515 U.S. 29, 132 L.Ed.2d 27, 115 S.Ct. 1927 (1995). *See, e.g., Staudt v. Glastron,* 92 F.3d 312 (5th Cir. 1996); *Ceglarek v. John Crane, Inc.,* No. 96 C 6672, 2000 WL 1745183 (N.D.Ill. Nov. 27, 2000). The Supreme Court did not, however, specify which state statute of limitations is applicable. The Second, Eighth, and Tenth Circuits have held that the state breach-of-contract limitations period is applicable to WARN claims. *United Paperworkers International Union v. Specialty Paperboard, Inc.,* 999 F.2d 51, 57 (2d Cir. 1993); *Aaron v. Brown Group, Inc.,* 80 F.3d 1220, 1224 – 1225 (8th Cir. 1996); *Frymire v. Ampex Corp.,* 61 F.3d 757, 764 (10th Cir. 1995). *See also Nelson v. Formed Fiber Technologies, Inc.,* 856 F.Supp.2d 235 (D.Me. 2012) (applying breach-of-contract limitations period). *But see Bledsoe v. Emery Worldwide Airlines, Inc.,* 635 F.3d 836, 842 (6th Cir. 2011) ("[A] better comparison might be to a breach of an employer's fiduciary duty, which is an action recognized as equitable in nature.").

Any employer who orders a closing or layoff in violation of WARN notice requirements is liable to affected employees for backpay for each day of violation during the violation period. 29 U.S.C. §2104(a). Courts have held that such backpay payments are civil damages and not wages for the purposes of state wage payment statutes. *Taylor v. Mutual Mining, Inc.,* 209 W.Va. 32, 543 S.E.2d 313, 315 (2000) (applying West Virginia Wage Payment and Protection Act, W.Va. Code §21-5-1, *et seq.*). Also, employers are liable for "benefits under an employee benefit plan described in [§3(3) of the Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. No. 93-406, 88 Stat. 829 (29 U.S.C. §1002(3)], including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred." 29 U.S.C. §2104(a)(1)(B).

The majority of circuits, including the Seventh Circuit, have found that employers who violate the WARN Act must pay damages based on the number of workdays within the violation period, as distinguished from calendar days. *Castro v. Chicago Housing Authority,* No. 99 C 6910, 2003 WL 21518321, *11 (N.D.Ill. July 1, 2003), *aff'd,* 360 F.3d 721 (7th Cir. 2004); *Local 1239, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers v. Allsteel, Inc.,* 9 F.Supp.2d 901, 903 (N.D.Ill. 1998). *See also Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.,* 244 F.3d 1152 (9th Cir. 2001) (finding that backpay should be calculated based on workdays and include tips and holidays or vacation pay for days that would have been worked); *Joe v. First Bank System, Inc.,* 202 F.3d 1067 (8th Cir. 2000) (holding that backpay should be calculated based on workdays); *Burns v. Stone Forest Industries, Inc.,* 147 F.3d 1182 (9th Cir. 1998) (same); *Breedlove v. Earthgrains Baking Cos.,* 140 F.3d 797 (8th Cir. 1998) (same).

In contrast, the Third Circuit has taken the minority position that an employer must pay backpay damages for each calendar day within the violation period, regardless of whether that day would have been a regular workday for each aggrieved employee. *See United Steelworkers of America, AFL-CIO-CLC v. North Star Steel Co.,* 5 F.3d 39 (3d Cir. 1993). *See also 1199 SEIU United Healthcare Workers East v. South Bronx Mental Health Council, Inc.,* No. 13 Civ. 2768(JGK)(JCF), 2013 WL 6003731 (S.D.N.Y. Nov. 13, 2013); *In re 710 Long Ridge Road Operating Co.,* 505 B.R. 163 (Bankr. D.N.J. 2014).

In addition, at least one court has held that aggrieved employees may also recover prejudgment interest on damages recovered for WARN violations. *Carpenters District Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc.,* 15 F.3d 1275, 1288 – 1289 (5th Cir. 1994). Punitive damages, however, may not be available in WARN cases. *Finnan v. L.F. Rothschild & Co.,* 726 F.Supp. 460 (S.D.N.Y. 1989) (holding that 29 U.S.C. §2104(b) provided exclusive remedies and unambiguously foreclosed the availability of punitive damages under the WARN Act).

Under the WARN Act, a prevailing party may also recover attorneys' fees. 29 U.S.C. §2104. The WARN attorneys' fees provision is virtually identical to the fee-shifting language in many civil rights statutes. *Local Union No. 1992 of International Brotherhood of Electrical Workers v. Okonite Co.,* 358 F.3d 278, 287 (3d Cir. 2004).

The Supreme Court, reversing a decision by the Eighth Circuit, has held that unions have standing under Article III, §1, of the U.S. Constitution to bring WARN suits for damages on behalf of their members. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 134 L.Ed.2d 758, 116 S.Ct. 1529 (1996). In contrast, at least one court has held that pension and health and welfare funds do not have standing to bring WARN suits. *In re APA Transport Corp. Consolidated Litigation,* 541 F.3d 233, 242 (3d Cir. 2008) (stating that "only employees, union representatives and units of local government may bring suit").

Finally, if the employer fails to provide notice to the state dislocated worker unit and the appropriate unit of local government as required by the WARN Act, the employer incurs a civil penalty of $500 for each day of such violation. 29 U.S.C. §2104(a)(3). Moreover, the WARN Act provides that WARN rights and remedies do not preempt an employee's contractual statutory rights. 29 U.S.C. §2105.

The WARN Act permits an employer to reduce the amount of its liability under the Act by any earnings or benefits the employee received from the employer during the violation period. 29 U.S.C. §2104(a)(2). Excluded, however, are those payments an employer was legally obligated to make. For example, the Third Circuit has held that an employer could not deduct severance payments required under the Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. No. 93-406, 88 Stat. 829, from its WARN liability. *Ciarlante v. Brown & Williamson Tobacco Corp.,* 143 F.3d 139, 152 (3d Cir. 1998). Similarly, the Seventh Circuit refused to allow severance payments to reduce WARN damages. *Castro v. Chicago Housing Authority,* 360 F.3d 721, 734 (7th Cir. 2004). The severance payments were provided for in the same document as the settlement agreement under which the unions abdicated their rights to legal recourse. *Id.* The Seventh Circuit compared the involuntary and conditional severance payments to the ERISA payments at issue in *Ciarlante. Castro, supra,* 360 F.3d at 734 – 735, citing *Ciarlante, supra,* 143 F.3d at 152. The court found that because the severance payments were not voluntary or unconditional, they could not be used to reduce damages. 360 F.3d at 733. *See also Gray v. Walt Disney Co.,* 915 F.Supp.2d 725, 734 (D.Md. 2013) ("Preexisting ERISA severance benefits are not 'wages' and were legally owed to the plaintiffs in full for an involuntary layoff.").

Also, a court has discretion to reduce an employer's damages under the WARN Act if the employer demonstrates that it made a good-faith effort to comply with the Act. 29 U.S.C. §2104(a)(4). The good-faith exception requires an employer to prove both a subjective intent to comply and an objectively reasonable interpretation of the Act's requirements. *See Frymire, supra,* 61 F.3d at 767 – 768 (holding that district court abused its discretion in failing to reduce employer's WARN damages when employer reasonably but mistakenly determined that closed facility constituted single site of employment after conferring with corporate counsel). In *Castro, supra,* 360 F.3d at 732, the Seventh Circuit refused to reduce damages based on a good-faith effort to comply with the WARN Act because the employer did not do "everything possible" to give the employees adequate notice of termination. The Seventh Circuit found that the defendant took only minimal steps by sending an advance notice one month before the official notice to only union members rather than to all employees. *Id.* Also, the advance notice merely stated that the CHA was "contemplating" a security force closing and did not affirmatively announce the closing. *Id.* Finally, the Seventh Circuit found that the defendant's actions post-violation were not evidence of a good-faith attempt to comply with the WARN Act. 360 F.3d at 731 – 732. *See also Day v. Celadon Trucking Services, Inc.,* 827 F.3d 817, 836 (8th Cir. 2016) (finding that company failed to show reasonable basis for believing that it was not responsible for giving WARN notice).

D. [5.13] Illinois Worker Adjustment and Retraining Notification Act

The Illinois Worker Adjustment and Retraining Notification Act became effective January 1, 2005. The Illinois WARN Act is patterned after the federal WARN Act and whenever possible "shall be interpreted in a manner consistent with the federal Worker Adjustment and Retraining Notification Act and the federal regulations and court decisions interpreting that Act to the extent that the provisions of federal and State law are the same." 820 ILCS 65/55. The Illinois WARN Act, however, is broader than its federal counterpart.

The Illinois WARN Act covers some employers who are not subject to the federal WARN Act. The federal WARN Act covers employers of 100 or more full-time employees or 100 or more employees who in the aggregate work at least 4,000 hours per week, excluding overtime hours. 29 U.S.C. §2101(a)(1). The Illinois WARN Act covers employers of 75 or more full-time employees or 75 or more employees who in the aggregate work at least 4,000 hours per week, excluding overtime hours. 820 ILCS 65/5(c). The Illinois WARN Act does not expressly require that the 75 or more full-time employees must work in Illinois.

While the Illinois WARN Act mirrors the federal WARN Act with regard to the definition of a "plant closing," the Illinois WARN Act's definition of a "mass layoff" requires notice for smaller mass layoffs. Under the federal WARN Act, "mass layoff" means a reduction in force that (1) is not the result of a plant closing and (2) results in an employment loss at the single site of employment during any 30-day period for (a) at least 33 percent of the full-time employees and at least 50 full-time employees or (b) at least 500 full-time employees. 29 U.S.C. §2101(a)(3). Under the Illinois WARN Act, "mass layoff" means a RIF that (1) is not the result of a plant closing and (2) results in an employment loss at the single site of employment during any 30-day period for (a) at least 33 percent of the full-time employees and at least 25 full-time employees or (b) at least 250 full-time employees. 820 ILCS 65/5(d). Under both federal and state laws, the 30-day period may be expanded to a 90-day period in the event of layoffs of two or more groups. 29 U.S.C. §2102(d); 820 ILCS 65/25. Also, both laws require notice to part-time employees, although such employees are not counted when determining whether a plant closing or a mass layoff occurred. 29 U.S.C. §§2101(a)(5), 2102(a)(1); 820 ILCS 65/5(a), 65/10(a).

The Illinois WARN Act also requires that employers provide 60 days' advance notice to affected employees in the event of relocation. 820 ILCS 65/10. The term "relocation," however, is not expressly defined in the statute. Employment loss does not occur in the event of relocation if the employer offers to transfer the affected employees to other places of employment within commuting distance or if the employees accept a transfer offer, regardless of the distance. 820 ILCS 65/5(b).

The Illinois WARN Act requires notice to individual employees, even if the employees are represented by a union, while the federal WARN Act provides that notice to the union is sufficient. The Illinois WARN Act also requires notice to more local government officials than the federal WARN Act. Under the federal WARN Act, notice must be provided to (1) the chief elected officer of the exclusive representative or bargaining agent of the affected employees if the employees are represented by a union or, if there is no representative, to the affected employees; (2) the state dislocated worker unit; and (3) the chief elected official of local government. 29 U.S.C. §2102(a); 20 C.F.R. §639.6. Under the Illinois WARN Act, an employer must give 60 days' advance written notice of a mass layoff, relocation, or employment loss to (1) the affected employees, (2) representatives of affected employees, (3) the Illinois Department of Commerce and Economic Opportunity, and (4) the chief elected official of each municipal and county government within which the employment loss, relocation, or mass layoff occurs. 820 ILCS 65/10(a). In both the state and federal WARN Acts, "representative" is defined as the exclusive representative of employees within the meaning of §9(a) or §8(f) of the National Labor Relations Act (29 U.S.C. §159(a) or §158(f)) or §2 of the Railway Labor Act (RLA), ch. 347, 44 Stat. 577 (1926) (45 U.S.C. §152). See 29 U.S.C. §2101(a)(4); 820 ILCS 65/5(g). The Illinois WARN Act provides that "[a]n employer required to give notice . . . under this Act shall include in its notice the elements required by the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101, *et seq.*)." 820 ILCS 65/10(b).

The Illinois WARN Act provides for the federal WARN Act's faltering companies and unforeseeable business circumstances exceptions to the 60-day notice requirement. 820 ILCS 65/15(a). Unlike the federal WARN Act, the exceptions are available only if the Illinois Department of Labor (IDOL) determines that the exceptions should apply. See 29 U.S.C. §2102(b); 820 ILCS 65/15(a). To make this determination, the Illinois WARN Act requires the employer to provide to IDOL

> **(1) a written record consisting of those documents relevant to the determination of whether the employer was actively seeking capital or business, or that the need for notice was not reasonably foreseeable; and**
>
> **(2) an affidavit verifying the contents of the documents contained in the record.** 820 ILCS 65/15(b).

Also, the damages provisions of the federal and state Acts are slightly different. Under the federal WARN Act, employers who fail to give the required notice are liable to each aggrieved employee who suffers an employment loss for

(A) back pay for each day of violation . . .

(B) benefits under an employee benefit plan described in [29 U.S.C. §1002(3)**], including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.** 29 U.S.C. §2104(a)(1).

Under the Illinois WARN Act, employers are liable to each aggrieved employee for

(1) Back pay at the average regular rate of compensation received by the employee during the last three years of his or her employment, or the employee's final rate of compensation, whichever is higher.

(2) The value of the cost of any benefits to which the employee would have been entitled had his or her employment not been lost, including the cost of any medical expenses incurred by the employee that would have been covered under an employee benefit plan. 820 ILCS 65/35(a).

Under the Illinois WARN Act, employers are likely to be liable to an aggrieved employee for such non-ERISA benefits as paid time-off days the employee would have accrued or earned during the period of violation. An employer's backpay liability under the Illinois WARN Act, however, will be reduced by "[a]ny liability paid by the employer under federal law." 820 ILCS 65/35(c)(4).

The civil penalty under both the federal and Illinois WARN Acts is the same: up to $500 per day for each day of the employer's violation. 29 U.S.C. §2104(a)(3); 820 ILCS 65/40(a). "Any penalty amount paid by the employer under federal law shall be considered a payment made under [the Illinois WARN] Act." 820 ILCS 65/40(c).

Under the federal WARN Act, if an employer proves to the satisfaction of the court that the act or omission that violated the federal Act was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of the federal Act, "the court may, in its discretion, reduce the amount of the liability or penalty." 29 U.S.C. §2104(a)(4). Similarly, under the Illinois WARN Act,

[i]**f an employer proves to the satisfaction of the Director [**of IDOL**] that the act or omission . . . was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Act, the Director may in his or her discretion reduce the amount of the penalty.** 820 ILCS 65/40(d).

Under the federal WARN Act, an employer who fails to give the required notice may be sued in federal court, and the court, in its discretion, may allow the prevailing party reasonable attorneys' fees as part of the costs. 29 U.S.C. §§2104(a)(5), 2104(a)(6). The Illinois WARN Act does not expressly provide for attorneys' fees to the prevailing party.

Finally, the Illinois WARN Act gives the Director of IDOL the power to make rules providing for administrative hearings and the power to examine the records of an employer to determine whether a violation of the Illinois Act occurred. 820 ILCS 65/30. Under the federal WARN Act, compliance is not monitored by an administrative agency. Instead, affected employees or their representatives may file civil lawsuits in federal court. 29 U.S.C. §2104(a)(5).

E. [5.14] Reductions in Force

Permanent layoffs resulting from reductions in force, like other employment decisions, may not lawfully be based on categories protected by Title VII. However, "bona fide" seniority systems (42 U.S.C. §2000e-2(h)), and permanent layoffs resulting from reductions in force based strictly on seniority are usually immunized from liability under the Civil Rights Act of 1964. *See Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561, 81 L.Ed.2d 483, 104 S.Ct. 2576, 2581 (1984) (upholding "last hired, first fired" layoff plan); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). Perhaps because some employers find it hard to resist the temptation to use budget cutbacks or market changes as pretexts for retiring employees who have reached the highest pay ranges, the most successful challenges to permanent layoffs resulting from RIFs have been brought under the Age Discrimination in Employment Act. *See, e.g., Zaccagnini v. Chas. Levy Circulating Co.,* 338 F.3d 672 (7th Cir. 2003) (affirming finding that 51-year-old employee laid off in RIF along with 10 others could proceed with age discrimination claim when employee sought to be rehired and was passed over in favor of younger similarly qualified employees, and company offered shifting reasons for passing him over); *Barcenas v. Molon Motor & Coil Corp.,* 700 F.Supp.2d 994 (N.D.Ill. 2010) (holding that ADEA action brought by 9 terminated employees survived employer's summary judgment motion when all 12 employees terminated in RIF, including all 9 plaintiffs, were over age 40 and employer offered shifting explanations for selecting them for termination). Illinois employers should note that the Illinois Human Rights Act, 775 ILCS 5/1-101, *et seq.,* the Cook County Human Rights Ordinance, Cook County Code of Ordinances §42-30, *et seq.,* and the Chicago Human Rights Ordinance, Chicago Municipal Code §2-160-10, *et seq.,* also prohibit discrimination in employment on the basis of age (among many other protected characteristics and traits).

III. [5.15] AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

The Age Discrimination in Employment Act prohibits employers from discriminating in employment practices and decisions against workers 40 years of age or older. 29 U.S.C. §631. Excluded from the prohibitions of the ADEA are

a. certain employment decisions and practices, otherwise discriminatory, that are considered justified because they are based on a "bona fide occupational qualification" (29 U.S.C. §623(f)(1));

b. certain types of employee retirement and benefit systems (29 U.S.C. §623(f)(2)); and

c. certain decisions based "on reasonable factors other than age" (29 U.S.C. §623(f)(1)).

Because the ADEA's prohibitions are worded in language nearly identical to that of Title VII, courts frequently look to precedent under Title VII to interpret the ADEA. *See, e.g., Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 60 L.Ed.2d 609, 99 S.Ct. 2066 (1979); *Lorillard v. Pons,* 434 U.S. 575, 55 L.Ed.2d 40, 98 S.Ct. 866 (1978) (noting similar statutory aims and substantive provisions but different remedial and procedural provisions).

To be subject to the ADEA, an employer must be engaged in an industry affecting commerce and must have had 20 or more employees for each working day in each of 20 or more calendar weeks during the current or preceding calendar year. 29 U.S.C. §630(b). However, states and their political subdivisions are "employers" covered by the ADEA regardless of whether they have 20 employees. *Mount Lemmon Fire District v. Guido,* __ U.S. __, 202 L.Ed.2d 262, 139 S.Ct. 22 (2018). The term "industry affecting commerce" refers to any activity, business, or industry in commerce or in which a labor dispute would impede the free flow of commerce. 29 U.S.C. §630(h).

The ADEA, on its face, also covers federal, state, and local governments. 29 U.S.C. §§631(b), 633a. However, the United States Supreme Court has held that the ADEA does not validly abrogate the states' Eleventh Amendment immunity from suit by private individuals and that the Fourteenth Amendment forbids only instances of age discrimination in which the age-based classification is not rationally related to a legitimate state interest. *Kimel v. Florida Board of Regents,* 528 U.S. 62, 145 L.Ed.2d 522, 120 S.Ct. 631 (2000).

To pursue a claim under the ADEA, plaintiffs must first exhaust administrative remedies by raising the claim in a timely charge before the EEOC. 29 U.S.C. §626(d); *Tyburski v. City of Chicago,* 964 F.3d 590 (7th Cir. 2020); *Ajayi v. Aramark Business Services, Inc.,* 336 F.3d 520 (7th Cir. 2003).

A. [5.16] Conduct Prohibited by the Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act outlaws five categories of conduct by covered employers:

1. It is unlawful for an employer to refuse employment, discharge, or otherwise discriminate against any individual regarding compensation or terms, conditions, or privileges of employment if such action is taken because of the individual's age. 29 U.S.C. §623(a)(1).

An employer is not, however, required by the ADEA to adopt a policy that will maximize the number of older persons in its workforce, and an employer is entitled to make its own policies and business judgments if the reasons are not based on age or a pretext for discrimination. *O'Regan v. Arbitration Forums, Inc.,* 246 F.3d 975, 984 (7th Cir. 2001) (holding that courts "do not sit as a kind of 'super-personnel department' weighing the prudence of employment decisions made by firms charged with employment discrimination"), quoting *Wollenburg v. Comtech Manufacturing Co.,* 201 F.3d 973, 976 (7th Cir. 2000); *O'Connor v. DePaul University,* 123 F.3d 665, 670 (7th Cir. 1997) (explaining that "[n]o matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, [the ADEA does] not interfere"), quoting *Kralman v. Illinois Department of Veterans' Affairs,* 23 F.3d 150, 156 (7th Cir. 1994). To prove age discrimination, an employee must show that age was the but-for cause of the adverse employment action, not merely one of the motivating factors. *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 174 L.Ed.2d 119, 129 S.Ct. 2343, 2350 – 2351 (2009). *See also Babb v. Wilkie,* __ U.S. __, 140 S.Ct. 1168, 206 L.Ed.2d 432 (2020) (finding that but-for causation is not required under ADEA's federal-sector provision but is required for certain forms of relief).

2. It is unlawful for an employer to limit, segregate, or classify employees in a way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect an individual's status as an employee because of age. 29 U.S.C. §623(a)(2).

3. If an employer is discriminatorily paying a younger employee more than an older employee within the protected age group, it is unlawful for the employer to reduce the wage rate of the higher-paid employee. 29 U.S.C. §623(a)(3).

4. An employer is prohibited from discriminating against any of its employees or applicants for employment for opposing any practice made unlawful by the ADEA or making a charge, testifying, or otherwise participating in any proceeding under the ADEA. 29 U.S.C. §623(d).

5. It is unlawful for an employer to print or publish, or to cause to be printed or published, any notice or advertisement relating to employment by that employer indicating any preference, limitation, specification, or discrimination based on age. 29 U.S.C. §623(e).

Damages available to ADEA plaintiffs include backpay, benefits, and reinstatement. *But see Babb, supra* (finding that but-for causation is required for certain forms of relief).

Under the ADEA's two-tiered liability scheme, liquidated (double) damages are available to plaintiffs when the ADEA violation is willful. 29 U.S.C. §626. A violation is not willful when an employer "acted reasonably and in good faith in attempting to determine whether their [action] would violate the ADEA." *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 83 L.Ed.2d 523, 105 S.Ct. 613, 625 (1985). A violation is "willful" when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 105 S.Ct. at 625, quoting *Air Line Pilots Association, International v. Trans World Airlines, Inc.,* 713 F.2d 940, 956 (2d Cir. 1983). The difficulty has been — at least in the garden-variety case of an employee challenging a particular employment action taken against him or her — that the employer must be guilty of age animus to be held liable in the first instance. Anyone guilty of such intentional age discrimination would ordinarily seem necessarily to have been at least reckless under the *Thurston* standard, and therefore *Thurston*'s second tier seems to be more theoretical than pragmatic. *See Lindsey v. American Cast Iron Pipe Co.,* 810 F.2d 1094, 1100 (11th Cir. 1987) ("There is no logical way to square a finding of intentional discrimination with a finding of good faith on the employer's part."). Confronted with this dilemma, some post-*Thurston* courts devised other tests for willfulness under the ADEA, thereby reinvigorating the second tier envisioned by *Thurston*. *See Cooper v. Asplundh Tree Expert Co.,* 836 F.2d 1544 (10th Cir. 1988) (citing cases and holding that willful violation exists in disparate treatment claim if factfinder determines age was predominant factor in employer's decision).

In *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 123 L.Ed.2d 338, 113 S.Ct. 1701, 1709 (1993), the Court rejected the alternative definitions of "willful" proposed by some courts of appeal and reaffirmed the "willful" standard set out in *Thurston*. The Court in *Hazen Paper, supra,* held that "[t]he ADEA does not provide for liquidated damages 'where consistent with the principle of a two-tiered liability scheme.' It provides for liquidated damages where the violation was 'willful.' "

> **Since this decision 75% to 80% of the cases involving liquidated damages where the employer does not acknowledge making age-based decisions have upheld awards of liquidated damages … while the balance have not…. In contrast, approximately 60% of the cases prior to the Supreme Court's decision in *Hazen Paper* involving liquidated damages where the employer did not acknowledge making age-based decisions upheld liquidated damage awards … while the balance did not…. Accordingly, the percentage of cases found to involve non-willful violations has been reduced by half or more after the decision in *Hazen Paper.* [**Citations omitted.**]** *Annot.,* 165 A.L.R. Fed. 1 (2000).

See also Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, 777 (7th Cir. 2001) (holding violation is considered willful when "the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (quoting *Hazen Paper Co., supra,* 113 S.Ct. at 1708); explaining it is not necessary for plaintiff to show that "employer's conduct was outrageous, or provide direct evidence of the employer's motivation"); *Equal Employment Opportunity Commission v. Board of Regents of University of Wisconsin System,* 288 F.3d 296, 304 (7th Cir. 2002) ("An employer who truly violates the ADEA without knowing it and whose ignorance is not reckless is protected from a finding of recklessness.").

Frontpay is available in lieu of reinstatement at the discretion of the trial court. *See, e.g., Mattenson v. Baxter Healthcare Corp.,* 438 F.3d 763, 771 (7th Cir. 2006) (upholding trial judge's decision not to award frontpay and noting that frontpay is equitable remedy for judge, not jury, to determine); *Price v. Marshall Erdman & Associates, Inc.,* 966 F.2d 320, 324 – 325 (7th Cir. 1992); *Sass v. MTA Bus Co.,* 6 F.Supp.3d 238, 251 n.4 (E.D.N.Y. 2014) ("*Price* only stands for the principle that a plaintiff is entitled to front pay in lieu of reinstatement, not that he was required to elect the remedy of reinstatement prior to trial.").

B. [5.17] Defenses to Age Discrimination in Employment Act of 1967 Charges

There are six principal defenses to a claim against a covered employer under the Age Discrimination in Employment Act:

1. The challenged action or decision was not discriminatory on the basis of age.

2. The discharge or disciplinary action was for "good cause" as permitted by 29 U.S.C. §623(f)(3). This defense is often the same as asserting that no age discrimination occurred.

3. The action is "based on reasonable factors other than age [(RFOA)]." 29 U.S.C. §623(f)(1). This defense is available only to a claim of disparate impact. 29 C.F.R. §1625.7(d). The plaintiff bears the burden of "isolating and identifying the specific employment practice that allegedly

causes any observed statistical disparities." 29 C.F.R. §1625.7(c). The employer bears the burdens of production and persuasion to demonstrate an RFOA defense. 29 C.F.R. §1625.7(d). The following is a non-exhaustive list of considerations that are relevant to determining whether a practice is based on an RFOA:

> **(1) A reasonable factor other than age is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances. . . . To establish the RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.**
>
> **(2) Considerations that are relevant to whether a practice is based on a reasonable factor other than age include, but are not limited to:**
>
> **(i) The extent to which the factor is related to the employer's stated business purpose;**
>
> **(ii) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;**
>
> **(iii) The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;**
>
> **(iv) The extent to which the employer assessed the adverse impact of its employment practice on older workers; and**
>
> **(v) The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.** 29 C.F.R. §1625.7(e).

Last and most notable, a differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans that qualify for the exception to the ADEA found at 29 U.S.C. §623(f)(2). 29 C.F.R. §1625.7(f).

4. The challenged action or decision, although based on age, was based on a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. §623(f)(1). "Bona fide occupational qualification" is a term of art subject to narrow interpretation, and "[i]t is anticipated that this concept . . . will have limited scope and application." 29 C.F.R. §1625.6(a). The burden of establishing a bona fide occupational qualification is on the employer. *Id.*

5. The action was taken pursuant to the terms of a bona fide seniority system as long as it was not a subterfuge to evade the purpose of the ADEA. 29 U.S.C. §623(f)(2)(A).

6. The action was taken pursuant to the terms of a bona fide employee benefit plan in which, for each benefit, the actual amount of payment made on behalf of the older worker is no less than that made on behalf of a younger worker (see 29 C.F.R. §1625.10) or that is a voluntary early retirement incentive plan consistent with the purposes of the ADEA (see 29 U.S.C. §623(f)(2)(B)). The existence of an employee benefit plan, even if bona fide, cannot excuse the failure to hire any individual, and no such employee benefit plan may require or permit the involuntary retirement of an individual protected by the ADEA because of the individual's age. *Id.* The exception is designed to permit age-based reductions in benefit plans when those reductions are justified by significant cost considerations. 29 C.F.R. §1625.10.

IV. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 STANDARDS IN REDUCTION IN FORCE CASES

A. [5.18] Disparate Treatment

Traditionally, plaintiffs asserting wrongful termination under the Age Discrimination in Employment Act had two methods to prove their case by a preponderance of the evidence. The plaintiff could provide direct proof of a discriminatory intent that motivated the adverse employment decision. *Andrews v. CBOCS West, Inc.,* 743 F.3d 230, 234 (7th Cir. 2014), *overruled in part by Ortiz v. Werner Enterprises, Inc.,* 834 F.3d 760 (7th Cir. 2016); *Radue v. Kimberly-Clark Corp.,* 219 F.3d 612, 616 (7th Cir. 2000), *overruled in part by Ortiz, supra*. Such evidence may include "the so-called 'smoking gun' — or circumstantial evidence which establishes a discriminatory motive on the part of the employer through a longer chain of inferences." *Van Antwerp v. City of Peoria,* 627 F.3d 295, 298 (7th Cir. 2010). Alternatively, the plaintiff could provide indirect proof that but-for age, he or she would not have been terminated. *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 174 L.Ed.2d 119, 129 S.Ct. 2343, 2350 (2009).

Under the indirect method of proof, the plaintiff has the initial burden of establishing

> **a prima facie case that (1) she is a member of a protected class, (2) she performed reasonably on the job in accord with her employers' legitimate expectations, (3) despite her reasonable performance, she was subjected to an adverse employment action, and (4) similarly situated employees outside of her protected class were treated more favorably by the employer.** *Andrews, supra,* 743 F.3d at 234, quoting *Ptasznik v. St. Joseph Hospital,* 464 F.3d 691, 696 (7th Cir. 2006).

In 2016, however, in a ruling outside of the ADEA context, the Seventh Circuit rejected this framework, overruling previous precedent separating direct from indirect evidence and applying different legal standards to evidence based on those distinctions. *Ortiz, supra,* 834 F.3d at 765 – 766. In *Ortiz,* the Seventh Circuit expressed its frustration with the district court's use of direct and indirect evidence:

> **The district court's effort to shoehorn all evidence into two "methods," and its insistence that either method be implemented by looking for a "convincing mosaic," detracted attention from the sole question that matters: Whether a reasonable juror could conclude that [**the plaintiff**] would have kept his job if he had a different ethnicity, and everything else had remained the same.** 834 F. 3d at 763 – 764.

The court also rejected previous precedent requiring plaintiffs to establish a "convincing mosaic" of evidence showing discrimination, emphasizing that the convincing mosaic of evidence is not a legal test.

> **That legal standard . . . is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action. Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself — or whether just the "direct" evidence does so, or the "indirect" evidence. Evidence is evidence. Relevant evidence must be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled "direct" or "indirect." [**Citation omitted.**]** 834 F. 3d at 765.

The court sought to remove the "rat's nest" of legal tests (834 F. 3d at 766) and bring "harmony" to circuit law (834 F. 3d at 765).

While the Seventh Circuit overruled the disparate valuation of evidence based on whether it was direct or indirect, the court did not eliminate the framework set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). Regarding the burden-shifting framework, the court in *Ortiz, supra,* stated:

> **The burden-shifting framework created by *McDonnell Douglas* . . . sometimes is referred to as an "indirect" means of proving employment discrimination. Today's decision does not concern *McDonnell Douglas* or any other burden-shifting framework, no matter what it is called as a shorthand. We are instead concerned about the proposition that evidence must be sorted into different piles, labeled "direct" and "indirect," that are evaluated differently. Instead, all evidence belongs in a single pile and must be evaluated as a whole. That conclusion is consistent with *McDonnell Douglas* and its successors. [**Citation omitted.**]** 834 F. 3d at 766.

The *Ortiz* opinion did not incorporate the burden-shifting framework into its analysis. Instead, the opinion evaluated evidence in a "pile" against the "reasonable juror" standard. 834 F. 3d at 766 – 767. While the court maintained that the burden-shifting framework survived, it did not provide further instruction on how courts should treat the *McDonnell Douglas* framework going forward.

Under the typical *McDonnell Douglas* burden-shifting analysis, the plaintiff must prove the various elements of a prima facie case. The burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for its actions or decisions. *McDonnell Douglas, supra,* 93 S.Ct. at 1824. Once such a reason has been stated, the presumption of discrimination "drops from the case" (*Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089, 1095 n.10 (1981)), and the plaintiff's burden of persuasion then requires him or her to demonstrate that the employer's stated reasons are a pretext for age discrimination (*see St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993)). Under the ADEA, however, the burden does not shift to the employer to show that it would have taken action regardless of age in ADEA claims. *Gross, supra,* 129 S.Ct. at 2351. Instead, a plaintiff asserting wrongful termination under the ADEA bears the burden of persuasion to show that, "but for" age, he or she would not have been terminated. *Id. See also Babb v. Wilkie,* __ U.S. __, 206 L.Ed.2d 432, 140 S.Ct. 1168 (2020) (finding that but-for causation is not required under ADEA's federal-sector provision, though it is required for certain forms of relief); *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 123 L.Ed.2d 338, 113 S.Ct. 1701, 1706 (1993) ("In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision."); *Schuster v. Lucent Technologies, Inc.,* 327 F.3d 569 (7th Cir. 2003) (finding that employer's proffered reasons for reduction in force, including need to make unit leaner and financially independent to reduce costs and make unit more attractive to outside investors and to eliminate management overlap and reduce overall workforce size, were legitimate and nondiscriminatory); *Thorn v. Sundstrand Aerospace Corp.,* 207 F.3d 383, 386 (7th Cir. 2000) (applying *McDonnell Douglas* framework to claim under ADEA challenging layoff as part of RIF).

Although the Court in *Gross, supra,* 129 S.Ct. at 2349 n.2, noted that it had "not definitively decided whether the evidentiary framework of *McDonnell Douglas* . . . utilized in Title VII cases is appropriate in the ADEA context," the Seventh Circuit has continued to apply the *McDonnell Douglas* burden-shifting framework to ADEA claims. *See Martino v. MCI Communications Services, Inc.,* 574 F.3d 447, 455 (7th Cir. 2009) (applying burden shifting to ADEA claim post-*Gross,* but noting if plaintiff's ADEA claim cannot survive summary judgment, it evaporates in wake of Court's decision in *Gross;* explaining plaintiff must prove that, but-for age, adverse action would not have occurred); *Guinto v. Exelon Generation Co.,* 341 Fed.Appx. 240, 245 n.2 (7th Cir. 2009) (applying burden shifting to ADEA action after *Gross,* but noting that parties presumed burden shifting applied); *Senske v. Sybase, Inc.,* 588 F.3d 501, 506 (7th Cir. 2009) (indicating in dicta that burden shifting may apply to ADEA actions post-*Gross*); *Magallanes v. Illinois Bell Telephone Co.,* 728 F.Supp.2d 982, 997 (N.D.Ill. 2010) (noting that Seventh Circuit has long applied burden-shifting methodology to ADEA cases pre-*Gross* and seems to continue to do so even post-*Gross*); *Yee v. UBS O'Connor, LLC,* No. 07 C 7150, 2010 WL 1640192 (N.D.Ill. Apr. 22, 2010) (rejecting employer's argument that *Gross* held burden shifting inapplicable to ADEA). *But see Kodish v. Oakbrook Terrace Fire Protection District,* 604 F.3d 490, 501 (7th Cir. 2010) ("Whether such a burden shifting analysis survives the Supreme Court's declaration in *Gross* in non-Title VII cases, remains to be seen.").

Other circuits have reached the same conclusion. *See, e.g., Westmoreland v. TWC Administration LLC,* 924 F.3d 718 (4th Cir. 2019) (concluding that *Gross* preserved use of *McDonnell Douglas* framework for ADEA claims grounded in circumstantial evidence); *Sims v. MVM, Inc.,* 704 F.3d 1327 (11th Cir. 2013) (concluding that it is appropriate to continue applying *McDonnell Douglas* framework to ADEA cases post-*Gross*); *Shelley v. Geren,* 666 F.3d 599 (9th Cir. 2012) (finding that *Gross* does not overrule using *McDonnell Douglas* framework to decide summary judgment motions in ADEA cases); *Tusing v. Des Moines Independent Community School District,* 639 F.3d 507, 515 n.3 (8th Cir. 2011) (concluding that *McDonnell Douglas* framework is likely still appropriate way to analyze ADEA pretext claims because it shifts only burden of production); *Jones v. Oklahoma City Public Schools,* 617 F.3d 1273 (10th Cir. 2010) (same); *Gorzynski v. JetBlue Airways Corp.,* 596 F.3d 93, 106 (2d Cir. 2010) (same); *Jackson v. Cal-Western Packaging Corp.,* 602 F.3d 374 (5th Cir. 2010) (following prior Fifth Circuit precedent applying *McDonnell Douglas* to ADEA cases); *Smith v. City of Allentown,* 589 F.3d 684, 690 – 691 (3d Cir. 2009) (finding that but-for causation standard required by *Gross* does not conflict with application of *McDonnell Douglas* framework to ADEA claims); *Vélez v. Thermo King de Puerto Rico, Inc.,* 585 F.3d 441, 447 n.2 (1st Cir. 2009) (acknowledging *Gross* and applying *McDonnell Douglas* framework to ADEA claim); *Geiger v. Tower Automotive,* 579 F.3d 614, 622 (6th Cir. 2009) (explaining that *McDonnell Douglas* framework remains applicable to ADEA claims post-*Gross*).

Following *Ortiz, supra,* the Seventh Circuit has used three general approaches to evaluating evidence of discrimination, including evidence presented in ADEA cases. In some cases, the court has performed its own *Ortiz* analysis of the entirety of the evidence without regard to the burden-shifting framework used by the district court. *See, e.g., Williams v. Office of the Chief Judge of Cook County, Illinois,* 839 F.3d 617 (7th Cir. 2016). Other times, the court has simultaneously applied both the *Ortiz* and *McDonnell Douglas* approaches, usually following the *McDonnell Douglas* framework while applying *Ortiz* at the end of each factor or step in the burden-shifting framework. *See, e.g., Harris v. Office of Chief Judge of Circuit Court of Cook County,* 673 Fed.Appx. 537 (7th Cir. 2016). Finally, in other cases, the Seventh Circuit has bifurcated the analyses, reviewing the *McDonnell Douglas* burden-shifting framework in isolation before moving to a separate *Ortiz* inquiry. *See David v. Board of Trustees of Community College District No. 508,* 846 F.3d 216 (7th Cir. 2017). *But see Burton v. Board of Regents of University of Wisconsin System,* 851 F.3d 690, 697 (7th Cir. 2017) (identifying evidence as circumstantial to framing *Ortiz* standard and asking whether reasonable factfinder could *infer* forbidden factor was but-for causal link to adverse employment action in absence of direct evidence); *Cole v. Board of Trustees of Northern Illinois University,* 838 F.3d 888, 899 – 900 (7th Cir. 2016) (exchanging direct-indirect dichotomy for direct-circumstantial dichotomy).

Most decisions apply both methods — either through the simultaneous or bifurcated approach — and many decisions expressly acknowledge doing so to accommodate lower courts or plaintiffs that use the burden-shifting framework. *See, e.g., Reid v. Wal-Mart Stores, Inc.,* 274 F.Supp.3d 817, 822 (N.D.Ill. 2017). This raises the question of whether courts will incorporate the burden-shifting framework only when the plaintiff or lower court relies on it, or whether courts will continue to reference and apply the burden-shifting framework even if the plaintiff or lower court has instead relied on *Ortiz* alone. For now, parties who relied on the burden-shifting framework in their pleadings or who received a lower court judgment relying on *McDonnell Douglas* should anticipate an analysis on appeal that includes both *McDonnell Douglas*'s framework and *Ortiz*'s reasonable juror standard. *See Brown v. DS Services of America, Inc.,* 246 F.Supp.3d 1206, 1217 (N.D.Ill. 2017). This includes ADEA claims, as courts have applied *Ortiz* consistently across all types of claims, including claims under the ADEA (*see, e.g., David, supra,* 846 F.3d at 226) and in at least one RIF case (*see Brown, supra,* 246 F.Supp.3d at 1216).

District courts have most often followed the approaches used by the Seventh Circuit:

1. applying *Ortiz* alone (*see, e.g., Scales v. FedEx Ground Package System, Inc.,* No. 15 C 50038, 2017 WL 345576 (N.D.Ill. Jan. 24, 2017); *Edwards v. Illinois Department of Financial & Professional Regulation,* 210 F.Supp.3d 931 (N.D.Ill. 2016); *Cannon v. General Supply & Services, Inc.,* No. 15-cv-06982, 2016 WL 7339151 (N.D.Ill. Dec. 19, 2016));

2. applying *Ortiz* and *McDonnell Douglas* simultaneously (*see, e.g., Wyman v. Evgeros, Inc.,* No. 15 C 2758, 2017 WL 386651 (N.D.Ill. Jan. 27, 2017)); or

3. using a bifurcated approach that applies *McDonnell Douglas* and then *Ortiz* (*see, e.g., Santangelo v. Crown Cork & Seal USA, Inc.,* 255 F.Supp.3d 791 (N.D.Ill. 2017); *Dickey v. McDonald,* 238 F.Supp.3d 1068 (N.D.Ill. 2017)).

The bifurcated analysis is the most popular approach to date.

In applying *Ortiz* simultaneously with *McDonnell Douglas,* most courts organize the opinion by the *McDonnell Douglas* factors and conclude each factor and step of the burden-shifting framework with *Ortiz*'s reasonable juror standard. However, district courts have also combined the analyses entirely, either omitting reference to both approaches (*see, e.g., Chumbley v. Board of Education for Peoria District 150,* 220 F.Supp.3d 915, 922 (C.D.Ill. Dec. 9, 2016)), or explicitly referring to both *Ortiz* and *McDonnell* (*see, e.g., Kawczynski v. F.E. Moran, Inc.,* 238 F.Supp.3d 1076 (N.D.Ill. 2017) (appeal filed)). Those courts using the bifurcated approach acknowledge that other types of evidence traditionally excluded from *McDonnell Douglas* can now be considered under *Ortiz*. *See David, supra,* 846 F.3d at 227 – 228 (discussing employer's failure to process forms prior to retirement, supervisor's mention of retirement during discussion about title change and pay raise, and lack of credible reasons for pay raise); *Zegarra v. John Crane, Inc.,* 218 F.Supp.3d 655, 670 (N.D.Ill. 2016) (suggesting timing of workplace incident and adverse action could be considered for ADEA claims).

Some district courts have embraced the logic of *David, supra,* finding new patterns of organizing and evaluating evidence. *See, e.g., White v. Campanelli,* No. 1:14-cv-7215, 2017 WL 528380 (N.D.Ill. Feb. 9, 2017) (turning to *Ortiz* as safety net for "other evidence" that "informs the holistic inquiry" which is not typically used in *McDonnell Douglas*). Since *Ortiz* merely provides that all evidence must be evaluated on a level playing field without any privileged categories, such novel approaches are presumably appropriate as long as they evaluate the evidence as a whole.

B. [5.19] Reduction in Force Prima Facie Case: Disparate Treatment

"[T]he *McDonnell Douglas* formula for determining the proprietary of summary judgment in an employment discrimination case is applicable to RIFs." *Thorn v. Sundstrand Aerospace Corp.,* 207 F.3d 383, 386 (7th Cir. 2000). A terminated plaintiff can establish a prima facie case for an Age Discrimination in Employment Act violation in the context of a reduction in force by showing that (1) the employee was within the protected age group, (2) the employee was performing according to the employer's legitimate expectations, (3) the employee was terminated, and (4) similarly situated younger employees were treated more favorably. *Testerman v. EDS Technical Products Corp.,* 98 F.3d 297, 303 (7th Cir. 1996); *Oxman v. WLS-TV,* 846 F.2d 448, 455 (7th Cir. 1988). *See also O'Connor v. Consolidated Coin Caterers Corp.,* 517 U.S. 308, 134 L.Ed.2d 433, 116 S.Ct. 1307, 1310 (1996) ("Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class."). "The Seventh Circuit has defined 'substantially younger' as generally ten years younger." *Balderston v. Fairbanks Morse Engine Division of Coltec Industries,* 328 F.3d 309, 322 (7th Cir. 2003). *See also U.S. Equal Employment Opportunity Commission v. Circuit City Stores, Inc.,* No. 02 C 4672, 2006 WL 1343173, *5 n.8 (N.D.Ill. May 11, 2006) (stating that *Hartley v. Wisconsin Bell, Inc.,* 124 F.3d 887 (7th Cir.1997), did not hold that "an age difference of fewer than ten years completely forecloses an age discrimination claim"); *Schulz v. Varian Medical Systems, Inc.,* 315 F.Supp.2d 923, 934 (N.D.Ill. 2004) (concluding that if age difference is less than ten years, plaintiff must "direct[] the court to evidence that her employer considered her age to be significant"), quoting *Hartley, supra,* 124 F.3d at 893.

In RIF cases, when the plaintiff is not replaced, the *McDonnell Douglas* formula is modified slightly.

> **The plaintiff must present satisfactory evidence either that someone else (in an age-discrimination case, someone much younger than the plaintiff) . . . is now doing the work he was doing; or, if the work itself has vanished — maybe the entire division in which he worked was closed down — that the employer found a job elsewhere in the company for a much younger person who had also lost his job when the division was shut down. [**Citations omitted.**]** *Thorn, supra,* 207 F.3d at 386.

See also Showalter v. University of Pittsburgh Medical Center, 190 F.3d 231, 235 (3d Cir. 1999). *Cf. Bellaver v. Quanex Corp.,* 200 F.3d 485, 494 (7th Cir. 2000); *Beaird v. Seagate Technology Inc.,* 145 F.3d 1159, 1165 (10th Cir. 1998). By and large, however, the Seventh Circuit has

> **explained on several occasions . . . that the fundamental analysis of RIF cases is no different from the analysis appropriate to other forms of discrimination. . . . Conceptually, one can think of a RIF as a situation . . . in which the employer decides whom from a defined group it will "re-hire" or retain, considering all existing employees as roughly like applicants for retention. [**Citations omitted.**]** *Adams v. Ameritech Services, Inc.,* 231 F.3d 414, 422 (7th Cir. 2000).

The Seventh Circuit has also made a distinction between a "mini-RIF" and a RIF. A mini-RIF involves the frequently occurring situation in which a dismissed worker's duties are absorbed by another employee rather than eliminated. In this situation, the Seventh Circuit uses the following modified version of the *McDonnell Douglas* framework: (1) the plaintiff is a member of a protected class; (2) the plaintiff was meeting the employer's legitimate expectations; (3) the plaintiff suffered an adverse employment action; and (4) the plaintiff's duties were absorbed by employees not in the protected class. *Merillat v. Metal Spinners, Inc.,* 470 F.3d 685, 690 (7th Cir. 2006); *Johal v. Little Lady Foods, Inc.,* 434 F.3d 943, 946 (7th Cir. 2006); *Michas v. Health Cost Controls of Illinois, Inc.,* 209 F.3d 687, 693 – 694 (7th Cir. 2000).

Occasionally, employers that are in a perilous financial situation deny raises or bonuses to employees but do not lay them off. The Seventh Circuit has rejected the argument "that the denial of a [salary] raise (and we suppose *a fortiori* the denial of perks) is not an 'adverse employment action.'" *Hunt v. City of Markham, Illinois,* 219 F.3d 649, 653 (7th Cir. 2000). *But see Davis v. New York City Department of Education,* 804 F.3d 231, 236 (2d Cir. 2015) (holding that employer's denial or reduction of discretionary bonus could constitute adverse employment action).

The requirement of more favorable treatment of persons similarly situated should not be overlooked. *See, e.g., Glover v. U.S. Healthworks,* 326 Fed.Appx. 964 (7th Cir. 2009) (holding that employees over 40 who were terminated in RIF and whose duties were absorbed by person under 40 failed to establish ADEA claims when employee (1) failed to present any evidence about employees who were retained and (2) did not present evidence that RIF was pretextual or that employer did not honestly perceive plaintiff to be weaker performer than another employee who was retained). The purpose of the "similarly situated" requirement is

> **to determine whether there are enough common factors between a plaintiff and a comparator — and few enough confounding ones — to allow for a meaningful comparison in order to divine whether discrimination was at play.** *Barricks v. Eli Lilly & Co.,* 481 F.3d 556, 560 (7th Cir. 2007).

In RIF cases,

> **plaintiffs** [are] **required to show at a minimum that the [allegedly similarly situated] employees possessed analogous attributes, experience, education, and qualifications relevant to the positions sought, and that the younger employees obtained the desired positions around the same time as the RIF.** *Raymond v. Ameritech Corp.,* 442 F.3d 600, 610 – 611 (7th Cir. 2006), quoting *Radue v. Kimberly-Clark Corp.,* 219 F.3d 612, 618 (7th 2000), *overruled on other grounds by Ortiz v. Werner Enterprises, Inc.,* 834 F.3d 760 (7th Cir. 2016).

Likewise, the similarly situated person must be outside the protected class. *See, e.g., Martino v. MCI Communications Services, Inc.,* 574 F.3d 447, 454 (7th Cir. 2009) (holding fourth prong not met in ADEA RIF case in which number of younger employees were let go at same time as plaintiff, and noting that "[i]t's hard to make out a case for age discrimination when younger workers are also being shown the door"); *Hemsworth v. Quotesmith.com, Inc.,* 476 F.3d 487 (7th Cir. 2007) (holding ADEA claim failed when duties absorbed by person over 40), *overruled on other grounds by Ortiz, supra.*

C. [5.20] Proof of Discriminatory Intent/Pretext: Disparate Treatment

Once a prima facie case is established, the burden of production is shifted to the employer to articulate "legitimate nondiscriminatory reasons" for its actions. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089, 1095 (1981). To meet this burden of production, an employer must merely articulate some legitimate, nondiscriminatory reason for its actions or decisions. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). Once such a reason has been stated, the presumption of discrimination "drops from the case" (*Burdine, supra,* 101 S.Ct. at 1095 n.10), and the plaintiff's burden of persuasion then requires the plaintiff to demonstrate that the employer's stated reasons are a pretext for age discrimination (*see St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993)). This burden of establishing pretext is usually the real difficulty faced by plaintiffs.

In *Hicks, supra,* 113 S.Ct. at 2749, the Court settled a long-standing federal appellate court split, holding that a Title VII plaintiff is not entitled to judgment as a matter of law when the employer's asserted reasons for its employment decisions are rejected by the trier of fact. Instead, a plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason." [Emphasis in original.] 113 S.Ct. at 2752. While rejection of the defendant's proffered reasons "will *permit* the trier of fact to infer the ultimate fact of intentional discrimination," it does not compel judgment for the plaintiff. [Emphasis in original.] 113 S.Ct. at 2749. Doing so

> **disregards the fundamental principle of [**Federal Rule of Evidence**] 301 that a presumption does not shift the burden of proof, and ignores [**the Court's**] repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."** *Id.*

In other words, even though "rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*" [Emphasis in original.] 113 S.Ct. at 2749 n.4. *See also Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120, 1123 (7th Cir. 1994), in which the court opined that

> **the holding in *Hicks* is that a plaintiff is not entitled to judgment as a matter of law simply because she proves her prima facie case and shows that the employer's proffered reasons for her discharge are false. The next logical question is whether the plaintiff may prevail, not automatically as a matter of law, but through submission of her case to the ultimate factfinder, under such circumstances.**
>
> ***Hicks* answers this question in the affirmative.**

The Supreme Court subsequently extended this reasoning to the Age Discrimination in Employment Act in its decision in *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 147 L.Ed.2d 105, 120 S.Ct. 2097 (2000). Specifically, "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." 120 S.Ct. at 2108. The Court cautioned, however, that such a showing by a plaintiff will not always be adequate if "no rational factfinder could conclude that the action was discriminatory." 120 S.Ct. at 2109. The Seventh Circuit applied this reasoning in *Appelbaum v. Milwaukee Metropolitan Sewerage District,* 340 F.3d 573 (7th Cir. 2003). The Seventh Circuit affirmed the district court, finding sufficient evidence in the record for the jury to disbelieve the company's proffered reason for its actions. Citing *Reeves, supra,* the court held that if the jury disbelieved the company's reason for its action, then the jury was entitled to infer that the employer used the disbelieved reason as "a cloak for age discrimination." 340 F.3d at 579. Evidence that the court deemed sufficient consisted of (1) the company's shifting explanation for its actions, (2) a prior reduction in force in which the plaintiff was selected for layoff (but ultimately not laid off) despite the fact that there was a poorer performing younger employee who could have been selected instead, and (3) lesser discipline imposed on a similarly situated younger employee. 340 F.3d at 580 – 581. On this thin evidence, the court allowed the jury verdict against the company to stand. *See also Henderson v. Shulkin,* 720 Fed.Appx. 776 (7th Cir. 2017) (finding that employer's shifting explanations for not hiring plaintiff, among other evidence, could be sufficient to infer pretext).

In spite of this, plaintiffs would be well-advised to plead and to prove both that the defendant's asserted reasons are false and that discrimination was the true motivating factor. *See, e.g., Hazen Paper Co. v. Biggins,* 507 U.S. 604, 123 L.Ed.2d 338, 113 S.Ct. 1701, 1706 – 1708 (1993) (stating that liability under ADEA depends on whether age "actually motivated the employer's decision" and hesitating to infer age-based animus solely "from the implausibility of the employer's explanation"); *Pilditch v. Board of Education of City of Chicago,* 3 F.3d 1113, 1117 (7th Cir. 1993) (finding that, under *Hicks, supra,* plaintiff must prove reasons offered are fake and also that true reason for firing was discriminatory).

In analyzing pretext, the question is not whether the employer's decision was "right or wrong, but only 'whether the reason for which the [employer] discharged the [employee] was discriminatory.' " *Balderston v. Fairbanks Morse Engine Division of Coltec Industries,* 328 F.3d 309, 324 (7th Cir. 2003), quoting *Giannopoulos v. Brach & Brock Confections, Inc.,* 109 F.3d 406, 410 (7th Cir. 1997). Courts have readily accepted reasonable management judgments, even if they were in error, misguided, or otherwise bad business decisions. *See Merillat v. Metal Spinners, Inc.,* 470 F.3d 685, 693 (7th Cir. 2006) (holding that "[e]ven if [employer's] decision was, in retrospect, a mistake, that conclusion, made with the benefit of hindsight, does not mean that [employer] honestly did not believe that retaining [another employee] and terminating [plaintiff] was the appropriate decision at the time it was made"); *Ptasznik v. St. Joseph Hospital,* 464 F.3d 691, 697 (7th Cir. 2006) (holding that "[f]ederal courts have authority to correct an adverse employment action only where the employer's decision is unlawful, and not merely when the adverse action is unwise or even unfair"); *Holmberg v. Baxter Healthcare Corp.,* 901 F.2d 1387, 1392 (7th Cir. 1990) ("While management's poor business judgment may be a concern for shareholders, it does not give rise to a claim for employment discrimination."); *Komel v. Jewel Cos.,* 874 F.2d 472, 474 (7th Cir. 1989) (noting that courts do not "sit as a super-personnel department that reexamines an entity's business decisions," quoting *Dale v. Chicago Tribune Co.,* 797 F.2d 458, 464 (7th Cir. 1986)); *Smith v. General Scanning, Inc.,* 876 F.2d 1315, 1321 (7th Cir. 1989) (holding that "it is not our purpose to second-guess an employer's good faith business decision"); *Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1223 (7th Cir. 1980) (finding that ADEA "was not intended as a vehicle for judicial review of business decisions" and courts "will not inquire into the defendant's method of conducting its business").

When job performance is among the considerations used in conducting a RIF, plaintiffs may argue that the RIF was not actually driven by economics and was thus pretextual. Just because the employee's job performance was adequate does not necessarily mean that the defendant's explanation is a pretext for age discrimination. *Gustovich v. AT&T Communications, Inc.,* 972 F.2d 845, 848 (7th Cir. 1992). Instead,

> **plaintiffs** [must] **come up with evidence implying that the performance evaluations had been "cooked" in order to do in the older workers. One method would** [be] **to show that the managers expressed discriminatory attitudes, or acted in discriminatory ways, on other occasions.** *Id.*

Further, normal discharge criteria are modified slightly in the RIF and mini-RIF contexts. In a RIF or mini-RIF, even though an employee's performance may be satisfactory, "it does not mean that [the employee's] termination as part of a RIF was discriminatory." *Merillat, supra,* 470 F.3d at 693. The Seventh Circuit has recognized that, even if an employee would not have been fired under normal circumstances, "[i]n a reduction in force, someone has to go. It is usually the least qualified or least productive employee." *Fairchild v. Forma Scientific, Inc.,* 147 F.3d 567, 573 (7th Cir. 1998). *See also Balderston, supra,* 328 F.3d at 324 (holding that plaintiff did not demonstrate pretext when there was no evidence to show that employer "did not honestly believe [it] was dismissing a poorer performing, less suitable" employee in RIF).

Although the inquiry into discriminatory intent and/or falsity is fact-specific, among the activities that have been found to constitute sufficient evidence of discriminatory age animus are the following:

1. a post-RIF change in job titles while the RIF'd employee's job functions continued unchanged (*Franci v. Avco Corp.,* 538 F.Supp. 250 (D.Conn. 1982); *but cf. Sahadi v. Reynolds Chemical, Division of Hoover Ball & Bearing Co.,* 636 F.2d 1116, 1117 (6th Cir. 1980); *Grabb v. Bendix Corp.,* 666 F.Supp. 1223 (N.D.Ind. 1986));

2. derogatory comments about age (*Franci, supra; see also Ezell v. Potter,* 400 F.3d 1041 (7th Cir. 2005) (finding evidence sufficient to withstand summary judgment when there was evidence that decision-maker had plan to eliminate older workers because decision-maker believed older workers were slower than younger workers; evidence decision-maker frequently commented on plaintiff's gray hair and slow speed)); *Stumph v. Thomas & Skinner, Inc.,* 770 F.2d 93, 94 (7th Cir. 1985) (noting statement by defendant president that company "was going to have to get rid of some of its older employees and get a young, aggressive organization in place for when the economy turned around"); *but see Monaco v. Fuddruckers, Inc.,* 1 F.3d 658, 660 (7th Cir. 1993) ("Unless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of a discriminatory discharge."), quoting *McCarthy v. Kemper Life Insurance Cos.,* 924 F.2d 683, 686 – 687 (7th Cir. 1991); *Bechold v. IGW Systems, Inc.,* 817 F.2d 1282, 1286 (7th Cir. 1987) (referring to employees as "older" and "outdated" is not necessarily evidence of discriminatory intent when shown to be objective observation and not stereotype or generalization). Mere stray remarks, however, have been rejected as proof of discriminatory intent in a number of cases. *See, e.g., Cullen v. Olin Corp.,* 195 F.3d 317, 323 (7th Cir. 1999); *Cianci v. Pettibone Corp.,* 152 F.3d 723, 727 (7th Cir. 1998). *See also Bahl v. Royal Indemnity Co.,* 115 F.3d 1283, 1293 (7th Cir. 1997); *Rush v. McDonald's Corp.,* 966 F.2d 1104, 1116 (7th Cir. 1992). *But see Hatch v. Brillion School District,* Case No. 16-C-802, 2018 WL 3349004 (E.D.Wis. July 9, 2018) (finding that derogatory comments made during performance review were evidence of discriminatory mindset where there was no independent justification for non-renewal of contract).

   The fact that someone expressed discriminatory feelings but was not involved in the employment decision of which the plaintiff complains is not evidence that the decision had a discriminatory motivation. That is simple common sense. It is different when the decision-makers themselves, or those who provide input into the decision, express such feelings around the time of and in reference to the adverse employment action of which there is a complaint. *E.g., Ezell, supra; Bellaver v. Quanex Corp.,* 200 F.3d 485, 493 (7th Cir. 2000); *Hunt v. City of Markham, Illinois,* 219 F.3d 649, 653 (7th Cir. 2000); *Stone v. Autoliv ASP, Inc.,* 210 F.3d 1132, 1140 (10th Cir. 2000); *Vance v. Union Planters Corp.,* 209 F.3d 438, 442 (5th Cir. 2000); *Pitasi v. Gartner Group, Inc.,* 184 F.3d 709, 714 – 715 (7th Cir. 1999); *Bahl, supra; Cheek v. Peabody Coal Co.,* 97 F.3d 200, 203 (7th Cir. 1996). In the latter situation, it may be possible to infer that the decision-makers were influenced by those feelings in making their decisions.); and

3. belatedly asserting a new reason for the plaintiff's termination during the after-the-fact defense of an age discrimination claim (*see Graefenhain v. Pabst Brewing Co.,* 827 F.2d 13, 21 (7th Cir. 1987), *overruled on other grounds by Coston v. Plitt Theatres, Inc.,* 860 F.2d 834 (7th Cir. 1988); *see also Giacoletto v. Amax Zinc Co.,* 954 F.2d 424, 427 (7th Cir. 1992) (finding employer's implementation shortly before termination of subjective employment decision contradicted objective evidence)).

D. [5.21] Mixed Motives

The U.S. Supreme Court has rejected the mixed-motive framework for Age Discrimination in Employment Act cases. Accordingly, unlike in the Title VII context, employers may not avoid liability by proving that they would have made the same decision in question absent any discriminatory intent. *See Desert Palace, Inc. v. Costa,* 539 U.S. 90, 156 L.Ed.2d 84, 123 S.Ct. 2148 (2003) (Title VII) (eliminating the Price Waterhouse requirement that plaintiffs put forth "direct evidence" in mixed-motive cases to shift the burden of proof to the employer (citing *Price Waterhouse v. Hopkins,* 490 U.S. 228, 104 L.Ed.2d 268, 109 S.Ct. 1775 (1989)); *Price Waterhouse v. Hopkins,* 490 U.S. 228, 104 L.Ed.2d 268, 109 S.Ct. 1775 (1989) (same). In *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 174 L.Ed.2d 119, 129 S.Ct. 2343, 2350 – 2351 (2009), the Court held that the mixed-motive framework has no application to the ADEA, which is also unlike Title VII because it is a different statutory mechanism, enacted for different purposes, with altogether different language. Accordingly, the Court held

> **that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.** 129 S.Ct. at 2352.

Even though the Supreme Court has held that the mixed-motive framework has no application to ADEA claims and that an ADEA plaintiff must prove age was a but-for cause, this does not preclude a plaintiff from pleading ADEA claims and Title VII claims in the alternative. *See, e.g., Igasaki v. Illinois Department of Financial & Professional Regulation,* 988 F.3d 948 (7th Cir. 2021) (considering multiple potential theories of discrimination); *Pride v. Illinois Department of Human Services,* No. 12 cv 5740, 2013 WL 139881, *2 (N.D.Ill. Jan. 10, 2013) (holding that *Gross, supra,* does not preclude ADEA plaintiff from bringing claims based on other types of discrimination). For example, in *Babych v. Psychiatric Solutions, Inc.,* No. 09 C 8000, 2010 WL 3547981, *2 (N.D.Ill. Sept. 7, 2010), the court concluded that

> ***Gross*** **has nothing to say about pleading claims in the alternative. Although a jury may not be given a mixed motives instruction for the ADEA claim, it may be instructed to consider each of [**the**] plaintiff's claims on its merits.**

Similarly, the court in *Anbudaiyan v. State of Illinois Department of Financial & Professional Regulation,* No. 11 C 8893, 2012 WL 2525696, *3 (N.D.Ill. June 29, 2012), denied a motion to dismiss an ADEA claim, holding that the plaintiff has "not 'pled himself out of court' by asserting alternative claims of discrimination. Federal Rule of Civil Procedure 8(d)(2) permits a party to pursue alternative claims."

E. [5.22] Disparate Impact

Disparate impact claims are also available under the Age Discrimination in Employment Act. *Smith v. City of Jackson, Mississippi,* 544 U.S. 228, 161 L.Ed.2d 410, 125 S.Ct. 1536 (2005). Claims of disparate impact allow recovery for "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843, 1854 n.15 (1977). A disparate impact challenge to a reduction in force would essentially assert that a RIF violates the ADEA because it has the effect, however unintended, of disproportionately and negatively impacting persons over the age of 40. *See, e.g., Meacham v. Knolls Atomic Power Laboratory,* 554 U.S. 84, 171 L.Ed.2d 283, 128 S.Ct. 2395, 2398 – 2399 (2008).

In recognizing the viability of such a claim, the Court in *City of Jackson, supra,* 125 S.Ct. at 1544 – 1545, was careful to hold that, while a disparate impact claim is cognizable under the ADEA, the scope of liability under the ADEA is narrower than under Title VII. The reason for this is that the ADEA, unlike Title VII, affords employers the "reasonable factors other than age" defense. The Court reasoned:

> **Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. . . . Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group.** 125 S.Ct. at 1545.

Based on the RFOA provision and the foregoing rationale, the Court held that the business-necessity test applicable to Title VII disparate impact cases is not applicable in the ADEA context; rather, the appropriate test is for reasonableness such that the employer is not liable under the ADEA for a disparate impact on older workers as long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals. *See City of Jackson, supra,* 125 S.Ct. at 1546; *Meacham, supra,* 128 S.Ct. at 2404. In *Meacham, supra,* the Court explained that the RFOA defense is still nonetheless an affirmative defense for which the employer bears the burdens of production and persuasion. *See also O'Brien v. Caterpillar Inc.,* 900 F.3d 923 (7th Cir. 2018) (finding that employer satisfied its "relatively light" burden of showing that its liquidation plan was based on reasonable factors other than age); *Carson v. Lake County, Indiana,* 865 F.3d 526 (7th Cir. 2017) (finding that RFOA defense barred disparate impact claims because employer took adverse action to preserve its supplemental insurance plan for retirees and comply with federal law, not because employees were over 65).

To state a disparate impact claim adequately under the ADEA, plaintiffs must identify the *specific* policy or practice that they allege is responsible for the disparate impact. As the Court further explained in *Meacham:*

> **[A] plaintiff falls short by merely alleging a disparate impact, or "point[ing] to a generalized policy that leads to such an impact.". . . The plaintiff is obliged to do more: to "isolat[e] and identif[y] the *specific* employment practices that are allegedly responsible for any observed statistical disparities. . . . The aim of this requirement, as *City of Jackson* said, is to avoid the "result [of] employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances.' ". . . And as the outcome in that case shows, the requirement has bite: one sufficient reason for rejecting the employees' challenge was that they "ha[d] done little more than point out that the pay plan at issue [was] relatively less generous to older workers than to younger workers," and "ha[d] not identified any specific test, requirement, or practice within the pay plan that ha[d] an adverse impact on older workers." [**Emphasis in original.**] [**Citations omitted.**] 128 S.Ct. at 2405 – 2406, quoting *City of Jackson, supra,* 125 S.Ct. at 1545.

See also O'Brien, supra (finding actionable policy because liquidation plan applied same rules to hundreds of employees and caused significant age-based disparities); *Stamm v. Inter-Con Security Systems, Inc.,* No. 09-1374, 2010 WL 2663079, *2 (C.D.Ill. June 29, 2010) (dismissing ADEA disparate impact claim in which plaintiff did "not even identify a generalized policy of Defendant, much less isolate and identify specific employment practices that are responsible for any observed statistical disparities or any specific test, requirement, or practice of one of Defendant's policies"); *Combs v. Grand Victoria Casino & Resort,* No. 1:08-cv-00414-RLY-JMS, 2008 WL 4452460, *3 (S.D.Ind. Sept. 30, 2008) (granting motion to dismiss with respect to ADEA disparate impact claim because plaintiffs failed to point to specific employment practice to support their disparate impact claims and because plaintiffs' "vague claims of subjective decision-making cannot be considered a 'specific test, requirement, or practice' "), quoting *City of Jackson, supra,* 125 S.Ct. at 1545. *But see Chicago Regional Council of Carpenters, United Brotherhood Carpenters & Joiners of America v. Berglund Construction Co.,* No. 12 C 3604, 2012 WL 3023422, *3 (N.D.Ill. July 24, 2012) (holding that plaintiff adequately pleaded ADEA disparate impact claim when plaintiff alleged he was member of protected class of workers over 40, that employer's policy requirement had impermissible impact on carpenter applicants over 40, and specifically that of eight carpenter applicants who failed the requirement, six of them were over 40).

See §5.17 above for a discussion of the ADEA regulations regarding the RFOA defense.

F. [5.23] Wage Discrimination

Some employers have considered undertaking a reduction in force to reduce or eliminate personnel expenses, such as wages and fringe benefits. It is generally well-settled in the Seventh Circuit that employers may make personnel decisions based on reducing the cost of their payroll without immediately running afoul of the Age Discrimination in Employment Act.

> **Compensation is typically correlated with age, just as pension benefits are. The correlation, however, is not perfect. . . . "Because age and . . . [compensation levels] are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on . . . compensation level is necessarily 'age-based.' "** *Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120, 1126 (7th Cir. 1994), quoting *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 123 L.Ed.2d 338, 113 S.Ct. 1701, 1707 (1993).

Without more, considering characteristics other than age that are correlated with age, such as years of service or the vesting of pension benefits, does not violate the ADEA. *Hazen, supra*. In *Hazen,* 113 S.Ct. at 1707 – 1708, the Court held that employers may discharge employees to prevent the vesting of pension benefits without violating the ADEA. The Court reasoned that the ADEA requires an employer to ignore only an employee's age and does not specify further characteristics that an employer must also ignore. *Id.* Similarly, in *Anderson, supra,* 13 F.3d at 1125 – 1126, the Seventh Circuit held that the plaintiff could not prove age discrimination even if the employer discharged him based wholly on a desire to reduce salary costs. Moreover, the Equal Employment Opportunity Commission's regulations regarding the "reasonable factors other than age" defense provide that, in the disparate impact setting,

> [a] **differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2)** [29 U.S.C. §623(f)(2)] **exception to the** [ADEA]**.** 29 C.F.R. §1625.7(f).

Such action may, however, be actionable under §510 of the Employee Retirement Income Security Act. See 29 U.S.C. §1140. Further, an employer who targets employees with a particular pension status on the assumption that those employees are likely to be older engages in age discrimination, as "[p]ension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent . . . but in the sense that the employer may suppose a correlation between the two factors and act accordingly." [Citation omitted.] *Hazen, supra,* 113 S.Ct. at 1707. *See also Tramp v. Associated Underwriters, Inc.,* 768 F.3d 793, 800 – 803 (8th Cir. 2014) (finding genuine issues of fact as to whether desire to reduce insurance premiums was proxy for age).

V. PRACTICAL SUGGESTIONS AND CONSIDERATIONS

A. [5.24] Reduction in Force Procedures

An employer who is not able to eliminate shifts or jobs but must instead select individuals for layoff by job classification or department cannot take the same advantage of the business-judgment rule and thus faces a more difficult task. In such a situation, the employer must be sure that the layoff procedures are carefully thought out and that reasons for particular layoff decisions can be clearly articulated and supported by evidence. For an example of a relatively extensive reduction in force policy, *see Grabb v. Bendix Corp.,* 666 F.Supp. 1223 (N.D.Ind. 1986).

Also, as noted in §5.23 above, §510 of the Employee Retirement Income Security Act (29 U.S.C. §1140) prohibits the suspension, discipline, or discharge of an employee for the purpose of interfering with the attainment of rights under ERISA-covered plans, such as retirement plans. Thus, in *Gavalik v. Continental Can Co.,* 812 F.2d 834 (3d Cir. 1987), the Third Circuit held that the defendant's liability avoidance program constituted a violation of ERISA. The defendant, to reduce its unfunded pension exposure, adopted a corporate liability avoidance program having two goals: (1) to lay off employees who had not yet become eligible for pensions and (2) to retain employees whose benefits had already vested. 812 F.2d at 841 – 842. To achieve these goals, the defendant adopted a "cap and shrink" program, whereby employment at a plant was capped at a maximum number and then allowed to shrink through attrition. 812 F.2d at 840. The defendant designated as "permanently laid off" all employees below the cap line and tailored its business volume to meet the capped level of employment. *Id.* The court found that this program was discriminatory. 812 F.2d at 865.

B. [5.25] Performance Appraisals/Statistics

On balance, perhaps the best way to select those employees to be laid off in a particular job classification or department is through a performance appraisal system. To withstand scrutiny, however, the performance appraisal system must be neutral in terms of protected categories.

Performance appraisal systems can most readily be defended in court against discrimination charges if they meet the following four qualifications shared by appraisal systems that have successfully survived such challenges:

1. individuals responsible for evaluating employees were given specific written instructions on how to complete the appraisal;

2. appraisals were made using a system that was behavior-oriented rather than trait-oriented (*i.e.,* the appraisals were based primarily on objective as opposed to subjective criteria);

3. job analysis was used to develop the content of the appraisal system; and

4. results of the appraisal were reviewed with each employee.

See Hubert S. Feild and William H. Holley, *The Relationship of Performance Appraisal System Characteristics to Verdicts in Selected Employment Discrimination Cases,* 25 Acad.Mgmt.J. 392 (1982). See also Daily Lab.Rep. (BNA) at E-1 (Dec. 26, 1984) (discussing follow-up study by Professor Feild, analyzing sample of 31 court decisions to confirm this finding).

Once the weakest performers are identified via the performance appraisal process, the employer should perform a statistical analysis to determine whether there is going to be a statistically significant adverse impact against any protected group. The most widely used and recognized method for statistical analysis is the standard deviation analysis. The U.S. Supreme Court has ruled that if an employer is within two, or possibly even three, standard deviations of the expected norm under this formula, then there is no statistically significant adverse impact on the protected group. *Hazelwood School District v. United States,* 433 U.S. 299, 53 L.Ed.2d 768, 97 S.Ct. 2736 (1977).

Some courts, however, have indicated that statistics may be of qualified significance in the Age Discrimination in Employment Act setting. Unlike race or sex discrimination cases, courts have acknowledged in age discrimination that

> **in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in.** *Dorsch v. L.B. Foster Co.,* 782 F.2d 1421, 1427 n.6 (7th Cir. 1986), quoting *Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1224 (7th Cir. 1980).

Thus, statistical disparities may have to reach a heightened level of significance to be viewed as probative in the ADEA context. *See Grabb v. Bendix Corp.,* 666 F.Supp. 1223 (N.D.Ind. 1986). *See, e.g., Balderston v. Fairbanks Morse Engine Division of Coltec Industries,* 328 F.3d 309, 320 (7th Cir. 2003) (holding that, in ADEA reduction in force case, "[i]n order to be considered, the statistics must look at the same part of the company where the plaintiff worked; include only other employees who were similarly situated with respect to performance, qualifications, and conduct; the plaintiff and the other similarly situated employees must have shared a common supervisor; and treatment of the other employees must have occurred during the same RIF as when the plaintiff was discharged"); *Hemsworth v. Quotesmith.com, Inc.,*476 F.3d 487, 491 – 492 (7th Cir. 2007) (holding that statistical evidence that 84 percent of coworkers laid off during prior RIF were over age 40 did not establish that employee's subsequent termination was motivated by age discrimination under direct method, absent explanation as to how coworkers compared to employee), *overruled on other grounds by Ortiz v. Werner Enterprises, Inc.,* 834 F.3d 760 (7th Cir. 2016); *Vaughn v. CA Technologies, Inc.,* 169 F.Supp.3d 833, 840 (N.D.Ill. 2016) ("While plaintiffs in RIF cases 'bear no heavier a burden of proof than other ADEA plaintiffs,' . . . Plaintiff needs to muster statistics that involve employees that are comparable in light of their experience, performance, and qualifications." [Citation omitted.]).

C. [5.26] Releases and Waivers

Assuming there is no statistically adverse impact against any protected group, an employer who implements a reduction in force should consider offering discharged employees severance pay or other consideration to which they are not otherwise entitled in exchange for a comprehensive release of claims. By obtaining such a release, the employer may be able to foreclose any future litigation with its attendant expense, risk, and lost management time.

Courts have consistently recognized that Title VII permits employers and employees to settle disputes by using waiver agreements as long as the waiver of rights and release of potential liability are "voluntary and knowing." *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011, 1021 n.15 (1974). To ensure that older workers will not be coerced or manipulated into waiving their rights to seek relief under the Age Discrimination in Employment Act, the ADEA, as amended by the Older Workers Benefit Protection Act (OWBPA), Pub.L. No. 101-433, 104 Stat. 978 (1990), sets forth certain minimum requirements to establish a knowing and voluntary waiver. A failure to adhere to these requirements may render the employee's waiver unenforceable and leave the employer vulnerable to suit on ADEA claims despite having granted the employee monetary consideration in exchange for a waiver of such claims. *See, e.g., Oubre v. Entergy Operations, Inc.,* 522 U.S. 422, 139 L.Ed.2d 849, 118 S.Ct. 838 (1998); *Adams v. Ameritech Services, Inc.,* 231 F.3d 414, 431 (7th Cir. 2000); *Oberg v. Allied Van Lines, Inc.,* 11 F.3d 679 (7th Cir. 1993).

There are seven minimum requirements:

1. The waiver must be part of an agreement that is written in plain English. According to the EEOC's regulations, this means that

> [w]**aiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate. Employers should take into account such factors as the level of comprehension and education of typical participants. Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences.** 29 C.F.R. §1625.22(b)(3).

2. The waiver must specifically refer to rights or claims arising under the ADEA.

3. The employee may not waive rights or claims that arise after the date the waiver is signed.

4. The employee may waive rights or claims only in exchange for money or other benefits that exceed those to which the employee would already be entitled under the employer's existing benefits programs. "If a benefit or other thing of value was eliminated in contravention of law or contract, express or implied, the subsequent offer of such benefit or thing of value in connection with a waiver" is insufficient to make the waiver knowing and voluntary. 29 C.F.R. §1625.22(d).

5. The employee must be advised, in writing, to consult with an attorney before signing the agreement.

6. The employee must be given at least 21 days to consider the agreement before signing it. If the waiver is sought by the employer in connection with exit incentives or employment retirement programs offered to a group or class of employees (defined as more than one employee) rather than to merely a single employee, employees must be given at least 45 (rather than 21) days to consider and sign the agreement. 29 U.S.C. §626(f)(1)(F).

7. The agreement must provide that the employee may revoke the agreement within 7 days following the agreement's signing. See generally 29 U.S.C. §626; 29 C.F.R. §1625.22.

According to the EEOC's regulations, the OWBPA sets forth the "minimum requirements for determining whether a waiver is knowing and voluntary." 29 C.F.R. §1625.22(a)(2). Further, "[o]ther facts and circumstances may bear on the question . . . as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver." 29 C.F.R. §1625.22(a)(3).

In addition, the employer must inform all affected employees in writing and in plain English of

1. any class, unit, or group of individuals covered by the incentive program and the eligibility factors and time limits applicable to the program; and

2. the job titles and ages of all individuals eligible or selected for the program and the ages of individuals in the same job classifications who have not been selected for the program. 29 U.S.C. §§626(f)(1)(H); 29 C.F.R. §1625.22(f)(3).

If the waiver is sought in connection with exit incentive or employment retirement programs offered to a group or class of employees, it is important that employees not be misled or deceived with regard to any information provided regarding any subsequent actions, such as layoffs or terminations. Thus, if subsequent layoffs or terminations are being contemplated or discussed, employees who are eligible for the early retirement incentive program (ERIP) and request information about subsequent layoffs or terminations should be advised of the criteria by which those decisions will be made. To avoid discrimination claims, the criteria by which those decisions will be made must be carefully thought out and articulated.

Waivers and releases executed in settlement of pending EEOC charges or pending court actions are treated differently than waivers and releases obtained before filing formal proceedings. When agency or court proceedings are pending, the 21-day pre-signing consideration period does not apply; instead, the individual must be given only a reasonable amount of time to consider and sign the settlement agreement. 29 U.S.C. §626(f)(2). In addition, the provision allowing employees 7 days to revoke the agreement is inapplicable to waivers and releases signed in settlement of pending administrative or court actions. *Id.* Because the term "reasonable" amount of time is not defined, in practice most employers typically provide a review period of 21 days for single terminations or 45 days for group termination and also 7 days to revoke.

An employee's execution of a waiver and release does not affect the EEOC's rights and responsibilities to enforce the OWBPA, and no waiver can be used to interfere with an employee's right to file a charge or participate in any EEOC investigation. 29 U.S.C. §626(f)(4).

An employee who signs a waiver and then contends that the waiver is invalid is not required to return or offer to return the money or other benefits that the employer provided in exchange for the waiver in order to file suit against the employer under the ADEA. This is known as the "tender back" doctrine. In *Oubre, supra,* the employer sought to enforce a release of ADEA claims or alternatively to recover $6,000 it had paid the employee. The Supreme Court rejected both of the employer's arguments, holding that the release was unenforceable because it failed the OWBPA's time requirements and made no specific reference to claims under the ADEA. A divided Court held further that the employee's retention of severance pay did not amount to a ratification of the release of ADEA claims and that the employee was not required to tender back the employer's payment as a precondition to filing her ADEA suit.

Following *Oubre,* the EEOC issued regulations providing that an individual who signs a "waiver agreement . . . is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with [the] EEOC." 29 C.F.R. §1625.23(a). Further, "[n]o . . . waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement." 29 C.F.R. §1625.23(b). This prohibition includes, "but is not limited to, provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit." *Id.* The regulations also provide that "[n]o employer may abrogate its duties to any signatory under a waiver agreement, covenant not to sue, or other equivalent agreement, even if one or more of the signatories or the EEOC successfully challenges the validity of that agreement under the ADEA." 29 C.F.R. §1625.23(d). Finally, if an employee not only sidesteps a waiver but also prevails in the subsequent ADEA claim, the court may not order a setoff against the plaintiff employee's monetary award that exceeds "the amount recovered by the employee, or the consideration the employee received for signing the waiver agreement." 29 C.F.R. §1625.23(c)(1).

D. [5.27] Reduction in Force Early Retirement Benefits

Early retirement incentive programs were specifically affected by the Older Workers Benefit Protection Act in that the OWBPA amended the Age Discrimination in Employment Act to provide that "[i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide employee benefit plan . . . that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of [the ADEA]." 29 U.S.C. §623(f). Thus, when a company plans a reduction in force, it may decide first to offer early retirement benefits to employees to encourage their voluntary separation before implementing involuntary layoffs.

If an ERIP or any portion of an ERIP is provided under a qualified retirement plan, other considerations become important as the ERIP will be considered a form of benefit under the plan. As such, it is subject to the nondiscrimination rules applicable to qualified plans under the Internal Revenue Code. In particular, the ERIP must satisfy the 26 U.S.C. §401(a)(4) prohibition against discrimination in favor of highly compensated employees in the availability of optional forms of benefits. For plans that use calendar years, a highly compensated employee is any employee who (1) was a 5-percent owner of the employer at any time during that year or the previous year or (2) had compensation in excess of the amount set by the Internal Revenue Service for that year and, if the employer elects and the plan provides, was in the top-20 percent of the highest paid group of employees in the calendar year when ranked on the basis of compensation. 26 U.S.C. §414(q). For 2017, the compensation set by the IRS was $120,000.

On the other hand, ERIPs that provide a flat dollar amount (*e.g.,* $20,000), service-based benefits (*e.g.,* $1,000 multiplied by years of service), or a percentage of salary to all employees above a certain age should be held to be consistent with the relevant purposes of the ADEA. Similarly, ERIPs that provide flat dollar increases in pension benefits (*e.g.,* $200 per month) or percentage increases should also be held to be consistent with the relevant purposes of the ADEA. Finally, ERIPs that impute years of service and/or age (*e.g.,* a program that gives employees age 55 or older who retire during the specified window period credit for five additional years of service and/or age) would likewise be consistent with the relevant purposes of the ADEA.

In addition to the above restrictions, the OWBPA specifically allows employers to use two types of benefit packaging in connection with layoffs or terminations pursuant to a RIF. First, the employer may reduce the severance benefits that would otherwise be provided to workers by the value of their retiree health benefits if the retiree health benefits satisfy certain minimum standards. Second, the value of additional pension benefits that are provided to workers solely because of the layoff may be offset against severance pay under certain circumstances. In no other instance may an employer reduce or deny severance based on pension eligibility or pension receipt.

As mentioned above, there are rules and regulations that prohibit discrimination in favor of highly compensated employees. Although these regulations are extremely complex, a simplified testing procedure is provided for qualified ERIPs. To qualify, an ERIP must be available for not more than one year and must consist of a new early retirement option, a change in the formula for an existing early retirement option, or qualified social security supplements.

Under the simplest version of the test, an ERIP satisfies the nondiscrimination rules if the percentage of non-highly compensated employees eligible for the ERIP is at least 70 percent of the percentage of highly compensated employees. For example, assume an employer has 10 highly compensated and 100 non-highly compensated employees. If the employer offers an ERIP to 2 of the 10 highly compensated employees (20 percent), it must offer the ERIP to 14 of the 100 non-highly compensated employees (14 percent) to qualify since 14 percent is 70 percent of 20 percent. The 70-percent requirement can be reduced to as little as 20 percent depending on the composition of the employer’s workforce and the manner in which the class of eligible employees is defined.

In addition to being eligible for the simplified test, a qualified ERIP needs to be tested only in the year in which it is introduced and has no permanent effect on the plan’s benefit formula for purposes of nondiscrimination testing. An ERIP that does not meet these requirements for simplified testing may have the effect of complicating discrimination testing even after it has expired.

In addition to satisfying the nondiscrimination requirements of 26 U.S.C. §401(a)(4), an ERIP that is contained in a qualified retirement plan may raise issues under 26 U.S.C. §411(d)(6), which generally prohibits the elimination of certain benefits, rights, and features, which may include early retirement options, under a plan. If an ERIP is offered on a temporary basis, it will not be considered to be a permanent part of the plan and can be eliminated under §411(d)(6). However, if the employer offers a series of ERIPs over several years, the ERIPs may be considered to constitute a permanent addition to the plan and thus cannot be eliminated under §411(d)(6). The IRS has ruled that ERIPs offered in four consecutive years will not be considered a permanent addition to the plan, provided that there are independent business reasons for each of the ERIPs.

As a boost to employers who may want to offer early retirement incentives to long-term employees, the Employee Retirement Income Security Act does not prevent an employer from conditioning the receipt of benefits on an employee's waiver of job-related claims. *See Lockheed Corp. v. Spink,* 517 U.S. 882, 135 L.Ed.2d 153, 116 S.Ct. 1783 (1996).