

The Performance Review Podcast
Episode 26
Greenberg Traurig, LLP

Speaker 1 ([00:00](#)):

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([00:14](#)):

Welcome to The Performance Review, Greenberg Traurig's California Labor and Employment Law Podcast, where we discuss and review important trends and topics for California employers with hosts Ryan Bykerk and Philip Person.

Philip Person ([00:26](#)):

Welcome back to The Performance Review. Tuned in to hear Ryan and I talk about reductions in force. As you know, it is a three-part series. We are now in our last part of the series. Last episode was our second part of the miniseries. In that episode, we discussed the legal requirements of federal WARN and state mini-WARN. As I said before, we really shouldn't call it mini-WARN because it's very important. In this episode, we're going to take a step away to not just discuss what the requirements are under worn, but we're also going to talk about the analysis you have to provide for an adverse impact decision.

([01:10](#)):

Reminder to our audience. Prior to all the riff episodes, as we've been saying, we really want to stress that this is a highly complex and technical area as you will see later. We are providing an overview, but not an exhaustive list of issues to be considered. Planning and consistent implementation are very important, so we suggest getting legal advice at all stages, very highly recommended.

([01:38](#)):

So again, we don't have a guest for this episode. So Ryan can be our pseudo guest, I guess, or we're sharing that responsibility.

Ryan Bykerk ([01:47](#)):

Right.

Philip Person ([01:47](#)):

Ryan, I think it's best we start off, let's probably talk about the Older Workers' Benefits Protection Act, OWBPA, for those who affectionately care about that statute.

Ryan Bykerk ([01:59](#)):

Yeah, absolutely. Yeah. So I'll be your guest and you could be my guest. So we'll be both hosts and guests on this episode.

([02:08](#)):

Yeah, look, the OWBPA, which is one of the more fun acts to refer to in an acronym, the OWBPA applies here in the RIF context. So I'm going to give us just a quick overview here of what that exactly looks like. One of the

things we said at the very beginning, I think in the first episode, is that we really think it's important to articulate and memorialize the justification for the RIF, and then just ensure that the employment decisions follow that. That's just as important when you're looking to comply with the OWBPA, as it is with some of the other topics that we've been discussing along the way.

[\(02:49\)](#):

So just as background, the OWBPA, which I now have said six times because it's fun to say, is an amendment to the Age Discrimination in Employment Act or the ADEA, and it sets forth specific requirements for waivers and releases of discrimination claims in employment agreements or separation agreements that relate to the protections of the Age Discrimination and Employment Act. The purpose of the OWBPA is to protect older workers from age discrimination and ensure that they have a fair opportunity to consider and negotiate these agreements. It does that in a couple of ways, and we'll talk about that here, but particularly in the RIF context, one of the things to just be aware of is that there's a 45-day notice period in order to comply with the OWBPA, because in a RIF context, multiple employees are going to be affected. So I'll get into this in a little bit more detail soon, but just that's an important piece of this. That 45-day notice period can screw things up for you if you don't plan for it in advance.

[\(04:02\)](#):

So let's look at a couple of the key requirements of the OWBPA. So when you're looking at a waiver of ADEA rights, the OWBPA requires that any waiver of an individual's right to bring an age discrimination claim under the ADEA, it's got to be knowing and voluntary. That means the waiver has to be in writing, and it has to specifically refer to rights and claims under the ADEA. There's some limitations here, you can't waive future rights under the ADEA and the agreement has to be supported by consideration, and it has to allow the employee to consult with an attorney.

[\(04:37\)](#):

Now, I mentioned a minute ago about this consideration period, right? I mentioned it at the front end because it's a potential trip hazard. The OWBPA requires that individuals be provided with a reasonable period of time to consider the waiver before accepting or signing the agreement. To be clear, all of the Age Discrimination Act itself applies to people who are 40 and over. So just so you know, that's the band of people we're talking about. So if you want to waiver of age discrimination related claims for folks who are 40 and over, typically an individual has to be given 21 days to review the agreement. In the group context, which we've been talking about for the last few episodes here, they have to be given 45 days. So there's an extension there. Easy thing to miss, easy thing to forget about. In addition, under either context, in an individual context or in a RIF context like we've been talking about, individuals have to be given at least seven days after signing the agreement to revoke it.

[\(05:41\)](#):

So I can say this because I'm now a member of the protected category here, but I have always thought it's a little interesting that for whatever reason, the legislature thinks that as soon as you tick over into 40, you just need more time to think about things and you need a chance to change your mind. So I just always have found that to be an interesting thing about this act. In any event, that's neither here nor there.

[\(06:08\)](#):

Really, this is all about information and advice. It's really about making sure people have the right information and making sure they have the opportunity to take, to seek out and obtain advice. You've got to receive sufficient information about the terms and conditions of the waiver under the OWBPA. It's got to be clear and understandable. The waiver implications have to be very clear. It has to be clear what specific rights are being waived, and also, particularly in the group context, the job titles and ages of the individuals being selected or not selected, have to be noted. So there's some disclosure requirements that happen in the RIF context under the

OWBPA that you need to be aware of on the front end. As a part of all of this, individuals who are going to be giving this waiver have to be advised in writing to consult an attorney before signing the waiver. They don't actually have to go do that, but they have to be advised in writing to go do so.

[\(07:06\)](#):

I've mentioned already there's a few of these things that are specific to the group termination context, but again, employers have to provide information about the group termination, such as the eligibility factors, the job titles, and the ages of those eligible for that group termination, and the ages of those selected and not selected for the program. So you got to do your due diligence on the front end, make sure to collect that information and then make sure that notice is made.

[\(07:35\)](#):

The decisional units, that's the way the statute refers to that, they have to be defined, they have to be justified. This all has to be, the company has to be able to explain and then articulate the bases. This can get really pretty challenging if you have workforces in a bunch of different locations or under different managers. Often companies will divide up a larger business unit to more appropriately fit selection criteria, but again, a lot goes into making sure that you've complied with the OWBPA in connection with any RIF. So it's really just another overlay in addition to all the things that we've talked about so far, including WARN and mini-WARN, this is something else to think about.

Philip Person [\(08:14\)](#):

So WARN, mini-WARN, and then you get to talk about the alphabet soup with the OWBPA, the ADEA.

Ryan Bykerk [\(08:22\)](#):

That's right.

Philip Person [\(08:23\)](#):

I'm going to transition us into talking about numbers, math. I know you, all our listeners didn't tune into this episode to hear a mathematical breakdown of a reduction in force, but that analysis is important. So what we're really talking about here are adverse impact analysis. In our prior episodes, we discussed having objective criteria or objective factors that come into play when you're selecting individuals, but sometimes even when you select those individuals, and there may not be any discriminatory animus there, you're using objective criteria. You still have an impact on protected categories that is just an adverse impact, and that's protected under the law, or it actually could lead to some liability. So that's why we do these adverse impact analysis pretty much almost anytime you're doing a RIF. Especially if the larger the RIF is, you want to make sure you do that adverse impact analysis.

[\(09:32\)](#):

Now, I promised you numbers, so let's talk numbers, right? What does a court look at? There's different sets of rules, or I use air quotes here because I know you [inaudible 00:09:45] rules, but standards that you can use are tests, statistical tests. One of them is provided by the EEOC guidance and other courts have discussed what's called the 80-20 rule or the four fifths rule. For those of you who aren't good at math, four fifths, it does break down to an 80-20.

Ryan Bykerk [\(10:06\)](#):

Okay, I appreciate you breaking that down for those people who need it, including myself.

Philip Person [\(10:12\)](#):

Just so you know, I did that without a calculator.

Ryan Bykerk ([10:14](#)):

Oh, I'm impressed.

Philip Person ([10:16](#)):

So what happens here is that the EEOC and other agencies, they can generally consider a selection rate for any race, sex, or other protected group, which is less than 80% of the selection rate for the group with the highest selection rate as a substantially different rate of selection. Different way of saying that is, if you cross that threshold, that 80-20 ratio, it's going to be looked at with suspicion. Even looking at the EEOC guidance, they say this four fifths or 80% rule of thumb is not intended as a legal definition, but as a practical means of keeping the attention of the enforcement agencies on serious discrepancies in rates of hiring, promotion and other selection decisions, which RIF is a selection decision. But we'd be remiss to say that the determination of these adverse impact, it's not purely is mathematical. It's not just straight math that you're doing here. Other factors are relevant.

([11:31](#)):

You have to consider, you may be looking at the 80-20 rule, but what if your workforce is made up of one particular category or highly made up of that category? That 80-20 rule could be adjusted, we don't know how that analysis works. So I wouldn't say a straight mathematical formula is there, but since we're talking about mathematical formulas, let me give you another one that court's considered.

([12:01](#)):

The standard deviation rule. Every time I hear this, I think back of my statistics class in college, and I actually did fairly decent in that class, but if you asked me to do it now, it might be a bad scene.

Ryan Bykerk ([12:17](#)):

Yeah, if someone used the term standard deviation in a class, I dropped it. That was not my deal.

Philip Person ([12:24](#)):

That's a reason why a lot of times when you do this adverse impact analysis, you have some attorneys who are able to do it in-house. Like I know we have some people in-house that we definitely use, but there's also times to get an expert witness who can provide that analysis, who can do that for you.

([12:44](#)):

So at a high level, some courts will look to the statistical deviation, and that's where you calculate the probability levels that the person from a particular protected class would be selected by chance or random selection for that RIF, and then you see the deviation from that.

([13:04](#)):

The Supreme Court has suggested that a general rule for large sample size is that quote, "If the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypotheses that the result was random would be suspect to a social scientist." So if you are two or three times standard deviations away from that, from what's expected, it's going to be looked at with suspicion, right? At least that's what the US Supreme Court has discussed. So that emphasizes the point that I said earlier is, whenever you're going through a reduction in force, obviously you have your objective factors that we talked about previously, but please also consider doing an adverse impact analysis because a court, an agency may look at that later and it would behoove you to use these tests that whether it's 80-20 standard deviation, to provide

that analysis to make sure that you can mitigate that risk. Even though you have good intentions, you don't want to have that adverse impact to come back and bite you.

Ryan Bykerk ([14:21](#)):

Yeah, no, exactly. I think that's the first time we've really done, used math terms on the Performance Review, so well done. Thank you, Philip.

Philip Person ([14:28](#)):

Maybe it's the last.

Ryan Bykerk ([14:30](#)):

It might be the last, yeah, we'll have to see. We'll have to see.

([14:34](#)):

All right, well, hey, yeah, thank you, Philip. That's really helpful. Look, just to quickly recap. We talked about on the first episode the difference between RIFs and layoffs. We talked about the importance of planning and messaging and really thinking ahead to get through a RIF or a layoff. We think that's particularly important given that it'd be an easy time for a business to say, we are having some trouble here, let's skip that part. I think as we've covered here in the last couple of episodes, you can't just skip it. You can't blindly move ahead. There's a lot of things to really think pretty carefully about here as you get into a RIF or a layoff. Then we talked about WARNs, sorry, the WARN Act, and then the different mini-WARN acts that exist in some of these different states, including of course in California, where we are, the one we interact with most.

([15:25](#)):

So lots covered in the last three episodes, but as we stressed at the beginning of this one, and I think several times throughout just it's pretty highly complex, technical area. Lots of different things out there to look for, lots of trip hazards. We tried to identify as many of those as we can here, but certainly we haven't turned over every rock and looked behind every tree. So planning, consistent implementation, talking to legal counsel as necessary, all really important parts of this. But hopefully this has been a good overview of some of the things to look at if you're looking into a RIF or a layoff.

Philip Person ([16:00](#)):

But after we've gone through that analysis of ADEA, OWBPA, and then bored our audience with statistics, we have to give them a fun or wild employment story, right?

Ryan Bykerk ([16:15](#)):

Of course, of course.

Philip Person ([16:16](#)):

Of course, right. This one, again, is not a case that I or the firm has worked on, but it's one that I've heard about or read about.

([16:26](#)):

It involved an employer who was rolling out a new policy where the employees had to clock in and clock out using a biometric hand scanner. The plaintiff employee, they requested a religious exemption to the policy, asserting that he, "feared damnation from its use." What he was really arguing was that, and I quote, "As part of an identification system and collection of personal data that would be used by the antichrist." That was his

concern. The employer eventually denied that request and threatened to discipline him if he didn't use those biometric scanners process, and the employee refused to do so. He eventually resigned or retired, went to court. The jury concluded that the employer failed to reasonably accommodate the plaintiff's sincerely held religious belief about the scanner being immoral. And The jury eventually awarded him for his constructive discharge, an award of \$600,000. So just be wary, anti-Christ could lead to more than \$600,000 if somebody has a sincerely held religious belief.

Ryan Bykerk ([18:04](#)):

Wow.

Philip Person ([18:04](#)):

Even dealing with a scanner is going to cost you.

Ryan Bykerk ([18:09](#)):

I'll be honest, I had no idea where that one was headed. Every sentence you said, I was really not sure where that was headed, but okay. All right, duly noted. So Phillip, I do have to ask. The jury awarded, I think you just said over \$600,000. Did the jury award \$666,000?

Philip Person ([18:29](#)):

That I don't know, but that certainly would be appropriate here.

Ryan Bykerk ([18:35](#)):

I would love to shake the hands of the jury that did that, if that in fact happened.

Philip Person ([18:39](#)):

Even better than that, I would love to be a fly on the wall in the deliberation room when they're coming up with that amount.

Ryan Bykerk ([18:46](#)):

You've learned something new on every one of these episodes, I got to tell you.

Philip Person ([18:50](#)):

You're always, always shocked with what a jury can come up with. Right?

Ryan Bykerk ([18:55](#)):

All right, well, good to know.

Philip Person ([18:59](#)):

But with that said, we want to thank our listeners for tuning in again, for joining us for this three-part series on reduction in force. As we said earlier, hopefully this series on the reduction in force will not lead to a reduction in listenership. You all enjoy these episodes and to the extent you have any questions, comments, ideas for future topics, feel free to email us at the performancereview@gtlaw.com. See you on the next episode.