

Alfred J. Landegger  
Larry C. Baron  
Michael S. Lavenant

Roxana E. Verano  
Laura S. Withrow  
Christopher L. Moriarty  
Oscar E. Rivas  
Elijah Richardson  
Marie D. Davis  
Brian E. Ewing

## **ARE YOU READY FOR 2009?**

### **New Laws for a New Year**

### **Employment Law Workshop**

**By**

**Michael S. Lavenant, Esq.**

**Alfred J. Landegger, Esq.**

**Main Office**

15760 Ventura Blvd.  
Suite 1200  
Encino, CA 91436  
(818) 986-7561  
Fax (818) 986-5147

**Ventura Office**

751 Daily Drive  
Suite 325  
Camarillo, CA 93010  
(805) 987-7128  
Fax (805) 987-7148

The attached workshop material must not be considered legal advice. The sample forms and policies are for educational purposes only. We strongly recommend that you consult with legal counsel before adopting or implementing any of the attached sample forms and policies so as to avoid potential liability.

# **Are You Ready For 2009?**

## **New Laws for a New Year**

**Presented by**

**Michael S. Lavenant, Esq.**

**Alfred J. Landegger, Esq.**

---

**LANDEGGER | BARON | LAVENANT**

Advice - Solutions - Litigation

## Major Topics

- FMLA Modifications
- ADA Amendments catch up to California
- Cell Phone Rules change again
- RIFs: Why, When & How?
- Meal Periods: To Break or not to Break
- Mileage Reimbursements: \$0.505/mile

---

---

---

---

---

---

---

## Overview

- Introduction to the ADA
- Supreme Court cuts back
- We're all disabled now:  
Here comes the ADAAA!
- Recommendations
- Q&A

---

---

---

---

---

---

---

## Federal Changes

- FMLA
- ADA
- EFCA - Expected

---

---

---

---

---

---

---

## Major Topics

- FMLA Modifications
- ADA Amendments catch up to California
- Cell Phone Rules change again
- RIFs: Why, When & How?
- Meal Periods: To Break or not to Break
- Mileage Reimbursements: \$0.505/mile

---

---

---

---

---

---

---

## Overview

- Introduction to the ADA
- Supreme Court cuts back
- We're all disabled now:  
Here comes the ADAAA!
- Recommendations
- Q&A

---

---

---

---

---

---

---

## Federal Changes

- FMLA
- ADA
- EFCA - Expected

---

---

---

---

---

---

---

### **FMLA Amendments**

- Regulations re-organized with many minor updates/changes
- Implemented Military FMLA
- Significant changes to notice and certification forms and process
- Did not address intermittent and reduced schedule leave issues
- Left basic SHC definition in tact.

---

---

---

---

---

---

---

### **Introduction to the ADA**

---

---

---

---

---

---

---

### **Basic provisions**

- Prohibits discrimination against "qualified individuals with disabilities"
- In appropriate cases, requires reasonable accommodations
- Has rules regarding pre- and post-employment medical inquiries that apply to everyone, disabled and non-disabled
- Has rules regarding confidentiality of medical information that apply to everyone, disabled and non-disabled

---

---

---

---

---

---

---

**"We're all disabled now":  
Here comes the ADAAA!**

---

---

---

---

---

---

---

---

**And now...The ADA  
Amendments Act of 2008**

- a.k.a. "The ADA Restoration Act"
- Will dramatically broaden the number of individuals who are considered "disabled"
- Anti-discrimination and reasonable accommodations provisions are relatively unchanged

---

---

---

---

---

---

---

---

**ADA Amendments Act**

- Specifically repudiates Supreme Court decisions in Sutton and Williams
- Will require that "disability" be considered without regard to ameliorating mitigating measures
- List of "major life activities" is expanded, and includes "lifting" and "bending"

---

---

---

---

---

---

---

---

## ADA Amendments Act

- For "regarded as" claim, employer need only "regard" employee as impaired, not as substantially limited
- ADAAA is a compromise between disability rights activists and business community -- was endorsed by U.S. Chamber of Commerce and Society for Human Resources Management

---

---

---

---

---

---

---

## Practical effect of ADAAA

- Will be difficult to defend ADA charges and lawsuits based on lack of "disability"
- Can expect increase in ADA activity as a result
- However, discrimination and reasonable accommodation defenses will be relatively unchanged

---

---

---

---

---

---

---

## Practical effect of ADAAA

- In short, employers will have to do the right thing by their employees with disabilities because they won't be able to rely on the defense of "no disability" the way they used to

---

---

---

---

---

---

---

### **"We're all disabled now"**

- "Substantially limited" is redefined
- "Major life activities" are increased
- "Major bodily functions" are created
- "Regarded as" is liberalized
- Is there anyone who doesn't fall into one of these categories?

---

---

---

---

---

---

---

---

### **"Substantially limited" before**

- BEFORE, an individual had to be "substantially limited [in a major life activity]." This meant, at minimum, that the individual had to be limited significantly more than the general "non-disabled" population

---

---

---

---

---

---

---

---

### **"Substantially limited" now**

- Prior EEOC definition of "substantially limits" has been overruled
- Only one "major life activity" need be limited
- Episodic impairments, or impairments in remission are still "substantially limiting"
- "Good" mitigating measures are not to be considered

---

---

---

---

---

---

---

---



## **"Major life activities"** **2008**

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Walking
- Speaking
- Breathing
- Learning
- Working

---

---

---

---

---

---

---

---

## **"Major life activities"** **2009**

All 2008 Activities  
*PLUS*

- Eating
- Sleeping
- Standing
- Lifting
- Bending
- Reading
- Concentrating
- Thinking
- Communicating

---

---

---

---

---

---

---

---

## **"Major bodily functions"**

### **Completely new**

- Immune system
- Normal cell growth
- Digestive
- Bowel
- Bladder
- Neurological
- Brain
- Respiratory
- Circulatory
- Endocrine
- Reproductive

---

---

---

---

---

---

---

---

### Mitigating measures

- "Ameliorative" mitigating measures are NOT to be considered in determining whether an individual is substantially limited in a major life activity or major bodily function
- Minor exception for normal eyeglasses and contacts, but selection criteria based on uncorrected vision must be job-related and consistent with business necessity

---

---

---

---

---

---

---

### "Regarded As" as of 1/1/09

- Under the ADAAA, an employee or applicant can assert a "regarded as" claim as long as the employer "regarded" him or her as being "impaired."
- Statute seems to make exception for "regarded impairments" of six months' duration or less

---

---

---

---

---

---

---

### What hasn't changed

- Non-discrimination: Employee still has to be able to perform essential functions of the job, with or without a reasonable accommodation

---

---

---

---

---

---

---

**What hasn't changed:  
reasonable accommodation**

- Employee must inform employer of disability if it's not obvious
- Employer has obligation to accommodate for as long as employee is employed and can be accommodated in some way
- Employer may request documentation of condition
- Employer need not consider accommodations that are not "reasonable" or are "undue hardship"

---

---

---

---

---

---

---

---

**What hasn't changed:  
reasonable accommodation**

- Employer need not accommodate disabilities that are "direct threat" to employee's or co-workers' health or safety (unless accommodation will remove "direct threat")
- Employer need not create a job, displace another employee, or promote a disabled employee as a reasonable accommodation

---

---

---

---

---

---

---

---

**What hasn't changed:  
reasonable accommodation**

- Employer need not waive production requirements that are required of all other employees in the job
- Employer may move employee to part-time or lower-paying job as a reasonable accommodation and pay accordingly
- Employer should (and, in some jurisdictions, must) engage in "interactive process"

---

---

---

---

---

---

---

---

### What else hasn't changed

- Pre- and post-employment medical examination processes, including drug tests
- Confidentiality of medical information
- Exclusions of certain conditions:
  - "Sex-based"
  - "Psychological-criminal"
  - Current use of illegal drugs

---

---

---

---

---

---

---

---

### Bottom line

- Should be easy to identify who is "disabled" – (ANSWER: just about everybody who claims it)
- Employers should expect slow start but accelerating requests for reasonable accommodation that will have to be considered
- Expect (eventual) dramatic increase in EEOC charges and lawsuits alleging disability discrimination

---

---

---

---

---

---

---

---

### Bottom line

- Employers will lose "fallback" position in litigation
- Management will have to be well-educated
- Employers who use medical criteria in making employment decisions are strongly cautioned to get a post-ADAAA assessment of their criteria

---

---

---

---

---

---

---

---

### **EEOC's "reasonable accommodation" priority**

1. Try to accommodate employee in his or her regular job
2. Try to move employee to different job that is similar to regular job in terms of duties, pay, and status
3. Try to move employee to different job, including part-time job (with part-time pay and possible loss of benefits)
4. Place employee on medical leave
5. Terminate employee

---

---

---

---

---

---

---

### **TOP TEN ADA MISTAKES BY EMPLOYERS**

1. Confusing "reasonable accommodation" with "light duty"
2. Failing to consult with the employee (not engaging in the interactive process)
3. Not following the EEOC's reasonable-accommodation priority
4. Paying too much attention to formal, written job descriptions
5. Paying too little attention to the way jobs are actually performed in the real world

---

---

---

---

---

---

---

### **TOP TEN MISTAKES**

(Continued)

6. Making accommodations that you don't legally have to make and that DON'T make good sense
7. Failing to make accommodations that you don't legally have to make but that DO make good sense
8. Being inflexible
9. Failing to document adequately
10. Failing to train management and employees about treating disabled co-workers with respect

---

---

---

---

---

---

---

### In other ADA news . . .

- The EEOC has recently issued new guidance on employer obligations to employees who cannot meet production, performance, or behavioral standards due to disabilities.  
See <http://www.eeoc.gov/facts/performance-conduct.html>

---

---

---

---

---

---

---

### State Law Changes

- Employee Releases
- Computer-Related Occupations
- Cell Phones
- Health Benefits

---

---

---

---

---

---

---

### State Law Changes

- **Employee Releases**  
AB 2075 - Labor Code section 206.5 prohibits an employer from requiring an employee to execute a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made. Violation of this provision is a misdemeanor, and the release is null and void. AB 2075 modifies existing law to define "execution of a release" to include requiring an employee, as a condition of being paid, to execute a statement of the hours he or she worked during a pay period which the employer knows to be false.

---

---

---

---

---

---

---

## State Law Changes

### • Temporary Employees

SB 940 - Pursuant to this bill, wage payments by a "temporary services employer" to an employee assigned to a client "are due and payable no less frequently than weekly, regardless of when the assignment ends, and wages for work performed during any calendar week shall be due and payable not later than the regular payday of the following calendar week." If an employee of a temporary services employer is assigned to work for a client on a day-to-day basis, that employee's wages are due and payable at the end of each day (which is also true if the employee is working for a client engaged in a trade dispute). These provisions do not apply if the employee is assigned to work for a client for over 90 consecutive calendar days, unless the employer pays weekly. The bill adds section 201.3 to the Labor Code.

---

---

---

---

---

---

---

---

## State Law Changes

### • Computer Professionals

AB 10 - If a computer professional is engaged in work that is primarily intellectual or creative and requires the exercise of discretion and independent judgment, among other requirements, he may be exempt from overtime compensation rules under section 515.5 of the Labor Code. To qualify, he must earn a certain hourly rate of pay (\$37.94 for 2009). AB 10 amends this section to provide that if the employee is paid a salary, the exemption applies so long as the employee earns an annual salary of not less than \$79,050 for full-time employment and is paid at least once a month in an amount not less than \$6,587.50 (these amounts, set by the Department of Industrial Relations, will change annually).

---

---

---

---

---

---

---

---

## State Law Changes

### • Cell Phones

- SB 28 - Effective July 1, 2008, it became illegal in California to drive a car while using a wireless telephone, unless the phone could be operated hands-free.
- With the passage of AB 28, effective January 1, 2009, it will be illegal to "write, send, or read a text-based communication" using an electronic wireless communications device while driving.
- A "text-based communication" includes a text message, instant message, or electronic mail.

---

---

---

---

---

---

---

---

## State Law Changes

### • Cell Phones (continued)

- A violation of the law will result in a fine of \$20 for the first offense, and \$50 for each subsequent offense.
- The restrictions in the law do not include reading, selecting, or entering a telephone number or name in an electronic wireless communications device for the purpose of making or receiving a telephone call.
- If you have a company policy placing restrictions on the use of cell phones while driving on company business, you may want to amend it to reflect this new limitation.

---

---

---

---

---

---

---

---

## State Law Changes

### • Health Care

- SB 1168 - Under this bill, if a health care service plan or health insurance policy provides coverage for a dependent child who is over 18 years of age and enrolled full-time at a secondary or postsecondary educational institution, that coverage shall not terminate, for a period not to exceed 12 months or until the date on which the coverage is scheduled to terminate pursuant to the terms and conditions of the policy, whichever comes first, if the dependent child takes a medical leave of absence from school.
- Certification of the need for the leave must be provided within specified time periods.

---

---

---

---

---

---

---

---

## State Law Changes

### • Health Care (Continued)

- AB 1894 - Of the numerous mandated benefit bills pending in the legislature this year, this is the only one that was signed.
- AB 1894 will require health care service plans and health insurers issuing individual or group contracts or policies, on or after January 1, 2009, to provide testing for human immunodeficiency virus (HIV) regardless of whether the testing is related to a primary diagnosis.

---

---

---

---

---

---

---

---



## San Francisco Ordinance

- **San Francisco Commuter Benefits Ordinance:** Effective January 19, 2009, employers must provide San Francisco-based employees with commuter benefits. The new ordinance applies to employers with 20 or more employees. In counting up the number of employees, employers must include all those who work full-time, part-time, or on a temporary basis, even those who work outside San Francisco. The benefit must only be extended to employees who work at least 10 hours a week within the geographic boundaries of San Francisco, however. Employers must provide employees with the option to make a pre-tax election under an IRC section 132(f) plan, an employer paid transit benefit (such as through the purchase of transit passes), or employer provided transit (such as a van pool). Employers who do not comply may be subject to penalties.

---

---

---

---

---

---

---

---

## Meal Period Status

- **Brinker & Brinkley**
- **Meal Periods:**
  - Employee must receive 30-minute, duty-free meal period if they work more than 5 hours in a workday.
  - Period may be waived by mutual consent if the employee works 6 hours or less.
  - Absent exigent circumstances, period can not be waived if employee works more than 6 hours.
  - Employer should permit and authorize employee to take meal period.
  - Meal period starting and stopping times should be documented.

---

---

---

---

---

---

---

---

## Mileage Reimbursement

- DLSE opines that payment of IRS mileage reimbursement rate is "presumed" to be a reasonable rate of reimbursement for use of personal vehicle
- Current rate as of 1/1/09 is \$0.55 per mile
- Prior rate was \$0.585 per mile
- Labor Code Section 2802 imposes burden upon employer to reimburse employee for all expenses reasonably and necessarily incurred as a result of the discharge of their duties.

---

---

---

---

---

---

---

---

## Reductions In Force

- Payroll employment fell by 524,000 over the month and by 1.9 million over the last 4 months of 2008. In December, job losses were large and widespread across most major industry sectors.
- Although the economy is driving the decisions, employees may still be able to retain claims.

---

---

---

---

---

---

---

## Reductions In Force

- Things to Consider:
  - Past Practice/Current Severance Policy
  - Past Employment Law Practices
  - Disparate Impact Analysis
  - WARN Requirements – State & Federal
  - Severance Agreements
  - Outplacement Assistance
  - Entitlement to Unemployment

---

---

---

---

---

---

---

## Any Questions?

Michael S. Lavanant, Esq.  
751 Daily Dr., Suite 325  
Camarillo, CA 93010  
Office: (805) 987-7128  
michael@landeggeresq.com

Alfred J. Landegger, Esq.  
15760 Ventura Blvd., Suite 1200  
Encino, CA 91436  
Office: (818) 986-7561  
alfred@landeggeresq.com

---

---

---

---

---

---

---

## **Family Medical Leave of Absence (FMLA)**

1. Family Care or Medical Leave Defined. The Company will provide an unpaid family care or medical Leave of Absence for any employee who has at least twelve (12) months service and has worked twelve hundred and fifty (1250) hours during the previous twelve (12) month period. If the employee has worked the required time for the Company, the reasons for requesting a family care or medical leave will determine whether the employee will receive such a leave. The following are reasons that will entitle an employee to a family care or medical leave:

- (i) Leave for reason of the birth of a child of the employee;
- (ii) Leave for reason of the placement of a child with the employee in connection with the adoption or foster care of a child;
- (iii) Leave for a serious health condition of a dependent child of the employee;
- (iv) Leave to care for a parent or spouse who has a serious health condition;
- (v) Leave because of a serious health condition of the employee which prevents the employee from performing the essential functions of their position;
- (vi) Leave because of any qualifying exigency arising out of the fact that the spouse, or a son, daughter or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation; and
- (vii) Leave to care for a spouse, son, daughter, parent or next of kin who is a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.

2. Maximum Amount of Family Care or Medical Leave. The maximum amount of time for family care or medical leave is three (3) months (12 work weeks) during a twelve (12) month period. This twelve-month period is a rolling period and dates back from the date leave is first used. Leaves for the birth of a child or the placement of a child must be completed within twelve (12) months following the birth or placement of the child. When both spouses work for the Company, the maximum combined amount of leave for the birth or placement of a child or to care for a parent is twelve (12) weeks in a twelve (12) month period. Intermittent leaves or leaves on a reduced work schedule are not permitted after the birth or placement of a child, unless the Company approves intermittent leaves in advance. This does not apply where the employee's child or the employee has a serious health condition requiring treatment. Leaves for the other reasons specified in the section above can be intermittent or on a reduced work schedule when medically necessary.

(A) Maximum Leave to Care for Service Member. The maximum amount of time for family care or medical leave for an eligible employee who is the spouse, son, daughter, parent or next of kin of a covered service member in the Armed Forces is twenty six (26) workweeks during a single twelve (12)-month period to care for the service member.

3. Position will be Held Open. At the termination of the leave, the employee will be returned to their former position or an equivalent one unless the employee's position has been eliminated. No break in service or loss of seniority occurs during the family care or medical leave. Employees on leave because they have a serious health condition must provide a release to return to work, signed by a health care provider.

4. Serious Health Condition Defined. A serious health condition requires inpatient care, subsequent treatment in connection with inpatient care, or continuing treatment by a health care provider. It includes absences which are on a recurring basis for treatment or recovery. Minor illness of brief durations (3 days or less) are not serious health conditions. Examples of serious health conditions are heart conditions, stroke, cancer, back injuries, pneumonia, emphysema, severe morning sickness, prenatal care, childbirth and recovery from childbirth. Serious health conditions do not include absence for substance abuse (except where treatment by a health care provider is sought), or routine physical exams.

(A) Serious Injury or Illness of Service Member Defined. A serious injury or illness in the case of a member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.

5. Health Care Providers' Certificate Required for Family Care Leave. Employees are required to provide the Company with a certificate from a health care provider which certifies that the leave is required. Employees requesting a leave to care for other family members or covered service member are required to provide a health care providers' certificate which states that the employee is needed to care for the individual or service member requiring care. In the case of an employee's illness, a health care provider certification is also required. The certificate must state that the employee is unable to perform the essential functions of the job. In the case of a serious health condition of the employee, the Company may require the employee to be examined by a different physician at the Company's cost. The exact information required is set forth on a form which will be provided to you.

(A) Certification Related to Active Duty or Call to Active Duty. Employees who are called to active duty may be required to provide the Company with certification showing the need for such leave as required by state or federal law.

6. Notice Required. Employees are required to give the Company thirty (30) days' advance notice of the date that their family care or medical leave will commence, unless the event that gives rise to the need for the leave was unforeseeable, in which case the employee shall give as much notice as practicable of the date when leave will be required. When planning medical treatment, employees are requested to consult with your supervisor in order to make a reasonable schedule, so as to not disrupt our operations, subject to the approval of your doctor.

(A) Notice for Leave Due to Active Duty of Family Member. In any case in which the necessity for service member family leave is foreseeable, whether because the spouse, or a son, daughter, or parent, of the employee is on active duty, or because of notification of an impending call or order to active duty in support of a contingency operation, the employee shall provide as much notice to the Company as is reasonable and practicable under the circumstances.

7. Interpretations of this Family Care or Medical Leave policy shall be governed by state and federal law.

8. Medical Insurance Coverage. Employees on family care or medical leave who are covered by a Company-sponsored group health plan will continue to be covered during the time they would have been working for the Company, absent the family care or medical leave. If the employee was paying a co-payment prior to the family care or medical leave for coverage on the Company-sponsored group health plan, the employee is required to continue to make the co-payment to maintain coverage while on family care or medical leave. The Company is not required to cover employees who do not make the requisite co-payment for insurance. Employees who do not return to the Company's employ after a family or medical leave shall reimburse the Company for all medical premiums paid on their behalf during the family care or medical leave.

9. Family care or medical leave is unpaid, and no benefits shall accrue during the period of the leave. However, employees may use any accrued vacation or sick time during such leave. Employees wishing to take a family or medical leave must fill out a request form and provide the required medical certification. These forms are available at the office and should be completed and submitted to your supervisor.

## **Constangy, Brooks & Smith LLP**

### **Family & Medical Leave Act Qualifying Events Summary**

\_\_\_\_\_ Military Care leave of up to 26 weeks in a year for the spouse, parent, son or daughter (of any age) and next of kin of (1) a current member of the Armed Forces, the National Guard or Reserves or (2) a member of the Armed Forces, National Guard or Reserves who is on the temporary disability retired list, who sustains an injury or illness in the line of duty for which (s)he is undergoing medical treatment, recuperation or therapy. A serious illness means an injury or illness that renders the service member medically unfit to perform the duties of his/her office, grade, rank or rating.

\_\_\_\_\_ Birth of a child and to care for/bond with new child.

\_\_\_\_\_ Placement of a child for Adoption/Foster Care (leave can occur before placement, e.g. to meet with attorney, pre-placement obligations).

\_\_\_\_\_ Qualifying Exigencies arising because of an employee's spouse, parent or son or daughter (of any age) who is on active duty or been called to active duty. This leave applies only to the family members of National Guard, Military Reservists and retired military personnel who are called to active duty by the federal government to participate in a contingency operation and does not apply to family member of individuals enlisted in the Regular Armed Forces.

#### **Qualifying Exigencies**

\_\_\_\_\_ Short Notice Deployment: To address any issues related to an impending call or order of seven or less calendar days (leave can be taken for a period of seven calendar days from the date of the notice).

\_\_\_\_\_ Military Events: To attend any official ceremony, program or event sponsored by the military and to attend family support/assistance programs sponsored by the military, military service organizations or the Red Cross.

\_\_\_\_\_ Childcare and School Activities: To arrange for alternative care when the call to duty necessitates a change; to provide urgent childcare when need is due to call to duty; to enroll or transfer to a new school; and, to attend a staff meeting. with school or daycare.

\_\_\_\_\_ Financial and Legal Affairs: To make or update financial or legal arrangements (e.g. prepare will, power of attorney)

\_\_\_\_\_ Counseling: To attend counseling sessions for the employee, for the covered military member or the child of the military member provided the need for counseling arises from the military call up or active duty.

\_\_\_\_\_ Rest and Recuperation: To spend time with a covered service member who is on short-term, temporary R&R. Eligible employees may take up to five days for each instance of R&R.

\_\_\_\_\_ Post-Deployment Activities: To attend ceremonies, briefings and events or other official ceremonies or programs sponsored by the military for a period of 90-days following termination of active duty status.

\_\_\_\_\_ Additional Activities: To address other events arising out of active duty or call to duty when the employer and employee agree to both the timing and duration.

\_\_\_\_\_ Serious Health Condition (SHC) of employees spouse, parent, son or daughter.

## Serious Health Conditions

A Serious Health Condition is an illness, injury, impairment, or physical or mental condition that involves either inpatient care OR continuing treatment by a health care provider. The following guidelines summarize the different types of conditions that qualify under the federal Family and Medical Leave Act as serious health conditions.

### INPATIENT CARE

- \_\_\_\_\_ 1. Overnight stay in a hospital, hospice, or residential medical care facility and any period of incapacity or subsequent treatment in connection with an overnight stay.

### CONTINUING TREATMENT

- \_\_\_\_\_ 2. Incapacity lasting more than 3 consecutive full calendar days and that involves (Note: Employee need not be absent from work for more than 3 calendar days, e.g., week-end illnesses):

- \_\_\_\_\_ a. 2 or more treatments within 30 days of the first day of incapacity by or under the supervision, orders, or referral of a health care provider (HCP). The first treatment must be in person and within 7 days of the first day of incapacity. If extenuating circumstances prevent a HCP recommended 2<sup>nd</sup> visit (e.g. physician unavailability) the second visit requirement may not apply.

#### OR

- \_\_\_\_\_ b. 1 treatment by a health care provider followed by a regimen of continuing treatment (e.g., prescription medication or therapy with specialized equipment but not over-the-counter medications or salves, bed-rest, fluid intake or exercise).

**Note:** Ordinarily, a serious health condition does not include common colds, the flu, ear aches, upset stomach, minor ulcers, headaches (except for migraine), routine dental or orthodontia problems, and periodontal disease unless complications arise.

- \_\_\_\_\_ 3. Any period of incapacity due to pregnancy (including severe morning sickness) or for prenatal care.

- \_\_\_\_\_ 4. Incapacity or treatment for a chronic serious health condition which is one that:
- a. requires periodic visits (at least twice per year) for treatment by or under the direct supervision of a health care provider

#### AND

- b. continues over an extended period (including recurring episodes)

#### AND

- c. may be episodic (e.g. asthma, diabetes, epilepsy)

- \_\_\_\_\_ 5. Permanent or long term incapacity for which treatment may be ineffective and which requires the supervision of, but not necessarily treatment by, a health care provider (e.g., Alzheimer's, severe stroke, terminal states of disease).
- \_\_\_\_\_ 6. Absence(s) to receive multiple treatment by or under the supervision, orders, or referral of a health care provider for:
  - \_\_\_\_\_ a. restorative surgery after an accident or injury

**OR**

- \_\_\_\_\_ b. a condition that is likely to result in incapacity of more than 3 consecutive full calendar days without medical intervention or treatment (e.g., cancer, severe arthritis, kidney disease).



### Addendum 1-A RIF Issues Checklist

*The checklist below summarizes many of the key points that should be considered in the RIF planning process. Some issues have multiple parts.*

*The importance of the issues raised in this checklist will be quite varied, and the relative weight accorded to certain issues will depend on individual circumstances.*

*Some issues will require a separate memo or extensive discussions; others may be resolved fairly quickly, with a simple "yes" or "no."*

*Finally, the answers to some of these questions may require legal advice, e.g., the WARN Act issues, disparate impact analyses. In those instances, a company must take careful steps if communications on such issues will be protected from disclosure by legal privileges.*

#### A. Objectives

1. Why is a RIF needed? \_\_\_\_\_
2. Are jobs to be redefined or eliminated? Y \_\_\_ N\_\_\_
3. From which areas and positions? \_\_\_\_\_
4. Based on what criteria? \_\_\_\_\_
5. In what time frame? \_\_\_\_\_
6. How many employees will be displaced? \_\_\_\_\_
7. Is retention until a scheduled date important? Y \_\_\_ N\_\_\_
8. What RIF benefits can and should be provided? \_\_\_\_\_

#### B. Alternative Approaches

1. Hiring freezes
2. Transfers
3. Job sharing or reduced hours
4. Temporary shutdowns
5. Voluntary leaves of absence
6. Exit incentives
7. Layoffs
8. Exit incentives followed by layoffs
9. Simultaneous exit incentives and layoffs
10. Other means, such as a retention bonus or pay cuts

#### C. Layoffs

1. Is there a demonstrable economic or other business need to lay off employees? Y \_\_\_ N\_\_\_
2. Is collective bargaining necessary? Y \_\_\_ N\_\_\_
3. Are WARN Act notices necessary? Y \_\_\_ N\_\_\_

Is there time to give WARN Act notice? Y \_\_\_ N\_\_\_

Has a paid-leave-in-lieu-of-notice strategy been considered? Y \_\_\_ N\_\_\_

4. Who will select positions for elimination or consolidation? \_\_\_\_\_
5. Who will select employees for layoff? \_\_\_\_\_
6. What criteria will be used for layoff decisions? \_\_\_\_\_
7. What procedural safeguards will be established? \_\_\_\_\_
8. Will bumping or other job transfer opportunities be offered? Y \_\_\_ N\_\_\_
9. Will the layoff breach express or implied employment contracts, the covenant of good faith and fair dealing, employee handbooks, labor contracts, layoff policies, or past practices? Y \_\_\_ N\_\_\_  
Is the employer's layoff policy properly structured? Y \_\_\_ N\_\_\_
10. Is there a legitimate basis for each proposed selection? Y \_\_\_ N\_\_\_
11. Will the layoff impact whistleblowers, litigious employees, or persons whose pension or retiree health benefits are about to vest? Y \_\_\_ N\_\_\_  
Will it raise other public policy concerns? Y \_\_\_ N\_\_\_
12. Will the layoff affect workers on maternity, family, medical, or other leaves? Y \_\_\_ N\_\_\_
13. Will the layoff have a statistically significant adverse impact on protected group members? Y \_\_\_ N\_\_\_
14. Will the layoff have any collateral impacts, such as triggering multi-employer pension plan withdrawal liabilities or causing a partial termination of a qualified retirement plan? Y \_\_\_ N\_\_\_

#### D. Exit Incentives

1. Does the desired layoff present legal risks sufficient to warrant offering exit incentives instead? Y \_\_\_ N\_\_\_
2. Is collective bargaining necessary? Y \_\_\_ N\_\_\_
3. Would the use of exit incentives enhance morale? Y \_\_\_ N\_\_\_
4. To whom should the employer offer the exit incentives? \_\_\_\_\_
5. How long should the window period be? \_\_\_\_\_
6. Should the employer retain the right to reject certain acceptances?  
Y \_\_\_ N\_\_\_
7. Will the exit incentive program raise age or other discrimination concerns?  
Y \_\_\_ N\_\_\_
8. How will the employer document the voluntary nature of participation in the exit incentive program? \_\_\_\_\_
9. How will exit incentive plan fraud claims be minimized? \_\_\_\_\_

#### E. RIF Benefits

1. What benefits are appropriate? \_\_\_\_\_
2. Should they be provided under a qualified plan? Y \_\_\_ N\_\_\_
3. Are the benefits affordable? Y \_\_\_ N\_\_\_
4. What will be the financial statement impact of the benefits? \_\_\_\_\_

5. How will the employer integrate health benefits with COBRA requirements? \_\_\_\_\_

6. Will the benefit program meet applicable ADEA, ERISA, Internal Revenue Code, and other legal requirements? Y \_\_\_ N\_\_\_

#### F. Releases

1. Should the employer require a release of claims? Y \_\_\_ N\_\_\_
2. Will the extra incentives be sufficient to obtain a release? Y \_\_\_ N\_\_\_
3. Is there time to seek an ADEA release? Y \_\_\_ N\_\_\_
4. Would the statistical data required to obtain an ADEA release be difficult to compile or create an inference of discrimination? Y \_\_\_ N\_\_\_

#### G. Implementation

1. Who will be on the employer's RIF task force? \_\_\_\_\_

How will responsibilities be allocated? \_\_\_\_\_

2. Is preparation of a RIF implementation schedule appropriate? Y \_\_\_ N\_\_\_
3. How will the task force make and document decisions? \_\_\_\_\_

What sort of training should be provided to task force members? \_\_\_\_\_

4. Will the employer try to keep the program secret until it is finalized?  
Y \_\_\_ N\_\_\_
5. Are new administrative forms or other documentation necessary?  
Y \_\_\_ N\_\_\_
6. Are forms complete, understandable, and practical? Y \_\_\_ N\_\_\_
7. How will the employer handle document preparation, printing, distribution, collection, processing, and retention? \_\_\_\_\_
8. How will the employer integrate the program with existing procedures for terminating employees? \_\_\_\_\_
9. How and when will supervisor training take place? \_\_\_\_\_
10. How will the employer communicate the program? \_\_\_\_\_
11. How will the employer comply with the WARN Act and communicate individual terminations? \_\_\_\_\_

Will outplacement counseling be an integral part of the communication process? Y \_\_\_ N\_\_\_

12. When will the employer provide final paychecks? \_\_\_\_\_
- How will the employer handle outstanding loans to employees? \_\_\_\_\_

Are final paycheck deductions permissible in the jurisdiction? Y \_\_\_ N\_\_\_

13. When will the employer collect its property from terminated employees? \_\_\_\_  
How will it safeguard its property from vandalism? \_\_\_\_\_  
\_\_\_\_\_

14. Is there a need to reemphasize preexisting confidentiality or trade secrets  
agreements with terminating employees? Y \_\_\_\_ N\_\_\_\_  
\_\_\_\_\_

**APPENDIX B**  
**GUIDE FOR CALCULATING**  
**WARN NOTICE TRIGGER FOR "MASS LAYOFF"**

At each single site:

1. Determine the date of the first termination to be caused by the reduction-in-force ("R.I.F.")
2. Count back 60 calendar days to determine WARN notice date.
3. Determine the number of "part-time" employees working at the site on the notice date. "Part-time" employees include:
  - (a) those employed for fewer than 6 of the 12 months preceding the notice date; and
  - (b) those who worked for fewer than 20 hours per week during the shorter of (1) the actual time employed, or (2) the most recent 90 days.
4. Subtract the number of "part-time" employees from the total number of active employees working at the facility to determine the number of "employees" (full-time employees).
5. Multiply the number of full-time employees by .33 to determine the "trigger" for WARN notices.
6. Determine the number of full-time employees who will be separated (terminated or laid off for longer than six months).
7. If the number from 6, above, equals or exceeds the "trigger" number from 5, above, and also equals 50 or more full-time employees, 60-day advance WARN notices must be given to:
  - (a) all employees (including part-time) affected by the R.I.F. Individual notices are required;
  - (b) the state dislocated worker unit (DWU);
  - (c) the chief elected local official; and
  - (d) the union, if applicable.