



**Lowenstein Sandler's Employee Benefits & Executive Compensation Podcast:
Just Compensation**

**Episode 21 -
Reduction in Force Considerations**

By [Megan Monson](#), [Julie Levinson Werner](#),
[Jessica Kriegsfeld](#)

FEBRUARY 2023

Kevin Iredell: Welcome to the Lowenstein Sandler podcast series. I'm Kevin Iredell, Chief Marketing Officer at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at [lowenstein.com/podcasts](https://www.lowenstein.com/podcasts). Or find us on iTunes, Spotify, Pandora, Google podcast, and SoundCloud. Now let's take a listen.

Jessica Kriegsfeld: Welcome to the latest edition of Just Compensation. I'm Jessica Kriegsfeld, an associate at Lowenstein Sandler. I'm joined today by two of my colleagues, Julie and Megan who I'll let introduce themselves.

Julie Werner: Hi, I'm Julie Werner. I'm a partner in the Employment, Litigation and Counseling Group.

Megan Monson: And I'm Megan Monson, partner in the Employee Benefits and Executive Compensation Practice Group.

Jessica Kriegsfeld: Thank you both for joining. Today's discussion will be focused on some employment and benefits considerations related to layoffs and reductions in force. Due to the current state of the economy, more and more companies are unfortunately finding themselves in a situation where they need to lay off part of their workforce, sometimes to conserve cash or for other business reasons. We plan to touch on some of the high-level considerations to keep in mind as companies navigate through this process. As always, this is not intended to be an exhaustive discussion, so we encourage you to consult with your legal counsel if you are considering a layoff or reduction in force. Let's get started. Julie, what are some of the legal considerations that you should be aware of when considering layoffs or reductions in force?

Julie Werner: So, Jessica, I think the primary thing is that a business always needs to be in a position to articulate what is it trying to achieve? Why is it engaging in this layoff or reduction in force at this time? What is the criteria that's being used to identify the number of people who are impacted, and who those specific people are? Essentially, why are they doing this now, and why are they picking who they're picking?

Jessica Kriegsfeld: Great, what are some other things to think about?

Julie Werner: So I think a lot of it we've seen lays in the execution. It's obviously a very unpleasant thing for people to go through, both in terms of the management side and certainly from the employee side. So I think companies need to be thinking about this both from a legal perspective as well as really just from a human perspective. From a legal perspective, firstly, to consider, do these people have any legal entitlement to any

type of severance or other contractual payments? If they don't, is there still a benefit or an interest in offering some type of severance or other benefits or consideration? And if so, will the company condition that on the employees signing a release? We've seen situations depending on how much is being offered and other circumstances when some companies have conditionally offered the payments in exchange for the employees signing a separation and general release agreement. And in other instances, where companies, for a variety of reasons, have said we're going to make these benefits available, but we're not going to condition it on a release.

In addition, as many employers may realize under the Age Discrimination and Employment Act, if they are subject to that law, which applies to companies that have 20 or more employees in the United States, there are additional considerations in terms of the amount of time that employees have to be offered to consider the release and other statistical information that the employer must include and certain time periods that the employees also have to consider. In addition, there are a number of state laws that also come into play in terms of time periods for release and certain content that has to be included in the separation and general release agreement.

Jessica Kriegsfeld: Megan, what do you typically see in the way of severance?

Megan Monson: So that's a great question, Jessica, and there's no hard and fast rule. But if a company is deciding to offer severance, it can be either a combination of or one of the following. Subsidized COBRA for a period of time, a period of salary continuation, potentially covering out placement benefits. And whether or not to offer any of those benefits really comes down to a function of the company's business reasons and if they have the cash on hand for doing so. Sometimes they also decide to offer things to employees who've been with the company for a longer tenure than others. There's also things that I tend to see companies offering on the equity side of things. In particular, a company tends to offer accelerated vesting for unvested stock options.

Usually, I've seen this come up more recently if there's an individual who's been at the company for a relatively short period of time, and all of their options may not have vested at all. So while the company's not necessarily having to come out of pocket to give somebody a benefit at the time of their termination, they're still giving them a chance to choose to exercise their options.

Now, this can be particularly important in terms of the timing aspect of things, and it's important to look at your underlying equity incentive plan and option agreements if this is something that you want to offer to employees. Because under many plans, options will simply expire to the extent they're unvested at the termination of employment and it can't be undone. And so if this is something you are considering, it's really important to be mindful of this and taking the necessary action to approve any sort of accelerated investing before somebody actually separates service.

So one of the things that we tend to see companies offering more and more frequently lately is the opportunity to allow for a longer post-termination exercise period for vested stock options. Most companies in general offer a 90-day window of time after somebody terminates employment in order to exercise their vested options, otherwise they will expire. But the challenge that many individuals are facing is that they're being unexpectedly terminated. They have to come out of pocket to pay for the exercise price of options. So they may be less inclined to exercise options within that kind of narrow period of time after they've been terminated. So companies are more often offering them a longer period of time during which they can extend their stock options. Sometimes it's a year post-termination, sometimes two. We see kind of a variety across the board. And that's a way that the companies can really give

something to employees, but they're not having to come out of pocket in order to do so.

The challenge that companies can face with extending the post-termination exercise period is for employees that have incentive stock options, employee's consent is needed to extend that period of time, because offering that longer period of time will convert the options into non-qualified stock options, and that creates other tax complications that we'll get into in another episode of the Just Compensation podcast. However, in order to do that, the employees need 29 days or less in order to affirmatively select to extend the post-termination exercise period. And that's just a virtue of the tax law requirements.

But the challenge is in order to release age discrimination claims that Julie mentioned earlier, there are also timing considerations. And in many instances, when you're dealing with a reduction in force and laying off a number of folks, the potential period of time to have the age discrimination claims released can be up to 45 days. And so you're facing this competing timing provisions that they have 45 days to return the release, but they have this one portion of the release that they need to consent to within 29 days or less. And so it's important and imperative for employers to plan properly, not only to make sure the documentation is clear on this point, but also then furnishing these individuals a separate document that they would have to sign to specifically address their affirmative election to extend the post-termination exercise period.

And this can get, again, a little bit complicated and the timing is really important. And so we would strongly urge you to consult with legal counsel or somebody who's well versed in these rules to make sure it's done properly.

The other point that I just want to mention in terms of the extending the post-termination exercise periods is that this also must be done before the original post-termination exercise period expires. And so similar with the point I made about the accelerated vesting, if an option otherwise would be forfeited under the terms of the equity plan, it can't be undone. And so if a company terminates somebody and then four months down the road they decide, "Oh, this person didn't exercise their options, we wanted to give them a benefit." If their plan had a 90-day post-termination exercise period initially, the option would've already forfeited and lapsed. So again, it's really important to pay attention to the terms of your planned documents and think with a little bit of forethought in terms of if you want to make any changes with respect to any sort of equity.

Jessica Kriegsfeld: Thanks, Megan. Julie, are there any other considerations?

Julie Werner: I think big picture of something that companies need to be thinking about is, and this is less of a legal issue and more of a PR issue, and just a human issue. Sometimes we lose sight of the fact these are people, this is people's livelihood. They unexpectedly are being told that their whole identity, the fact that where they devote all their business time and attention is all of the sudden in many instances coming to a halt. So these are people who are very invested and tied, oftentimes in their jobs, their careers, certainly in their income, and being mindful of the messaging and the delivery. There've been a lot of instances in the news oftentimes, and this is I guess just the unfortunate nature of news. We read about stories where things go wrong. I don't know, it's kind of hard.

And I will say proactively, many companies speak to me and want to do things right, and they ask for lessons. "Should we do it this way? Should we deliver each termination message individually?" That may not be possible if there's a large volume of people. "Should we do it in groups? Should we have a big all-hands meeting, and

should we tell everybody in advance that if you get a message that says this, you're in, you're out?" There's a lot of the mechanics, a lot of the delivery and logistics have been very challenging, particularly for companies that are executing at a very large-scale level. And one of the things that I've said to people is, and again, it's hard to gauge how people are going to react to these things, but I think if you are a company that has treated your employees well, people will assume at least good intent. Sometimes things get a little bungled and they don't always go as smoothly as companies would like. Other times they do.

But if you are a company that has treated your employees well and you've had a positive culture, workplace culture, then I think people sometimes are willing to overlook sometimes some of the logistical problems. But on the flip side, if you are a company that has not treated employees well, that has not instilled a positive culture, then people are also very quick to view sort of with negative intent, some of the inevitable bungling or logistical challenges that may happen. So there's been a lot of companies that have gotten press about, for example, there was one executive who delivered a Zoom meeting and just announced in Zoom the names of the people that were impacted. Or just said, we're doing this big layoff in a way that got picked up, and of course, you have to unfortunately assume these days that employees are recording your messages and recording your meetings. And so these are things that get picked up. So just being mindful of the logistics, the dynamics of how these things get delivered.

Offentimes in addition to sort of the all-hands meeting, companies will be very mindful of writing a message that gets circulated. And oftentimes these are things that get picked up too. So I think a lot of it is the human element, the PR element, and just to have those considerations in mind. A lot of our clients work with PR firms or communications firms to help them with some of the scripting and the mechanics of it as well as HR people. That's more on the PR and human side of things.

One point I also just want to make sure that we don't overlook is what's referred to as the WARN act. The WARN Act is a federal law that's been in place for many years. Increasingly, there have been a number of what are called mini WARN Acts, a number of states have passed laws that have different thresholds in terms of when advanced notice for severance may be required. There's a bill that was passed in New Jersey that is awaiting, well, it was passed by both houses of the legislature. It's awaiting likely the governor's signature that will make substantial changes to the New Jersey State WARN Act. These were changes that were supposed to come into play immediately prior to COVID. They got held in abeyance on the state of emergency being issued by Governor Murphy, and now it's likely that, would love to say COVID is over. I think we're all figuring out how to refer to what we call the new normal, et cetera.

But as the state of emergency is either hopefully going to be lifted soon, or even regardless of that, I guess moving forward in New Jersey, it's been contemplated in very short order, some substantial changes that will require in addition to notice for a longer period of time, other mandatory severance payments.

The other big picture thing to consider with respect to the WARN Act, which again requires a very close review and scrutiny, both as I said to the federal and the state laws, is this notion of essentially, WARN is often looked at in terms of a single site of employment. And so with the advent of remote workers, and in fact some companies that don't even have an actual office or headquarters, where do the employees work? And this I think is one of the most interesting developments in terms of remote work and how it's going to play out in terms of the WARN Act. As far as I know, there's not a reported decision expressly addressing that in any meaningful way. And so obviously no company wants to be the test case in this area, but it will be interesting

to see how the advent of remote work impacts WARN Act notifications and things of that nature.

Jessica Kriegsfeld: Thank you, Julie and Megan, for joining us today. We hope you found this discussion useful and provided some food for thought related to reductions in force. We look forward to having you back for our next episode of Just Compensation.

Julie Werner: Thanks, Jessica.

Kevin Iredell: Thank you for listening to today's episode. Please subscribe to our podcast series at [lowenstein.com/podcasts](https://www.lowenstein.com/podcasts), or find us on iTunes, Spotify, Pandora, Google podcasts, and SoundCloud. Lowenstein Sandler podcast series is presented by Lowenstein Sandler and cannot be copied or rebroadcast without consent. The information provided is intended for a general audience. It is not legal advice or a substitute for the advice of counsel. Prior results do not guarantee a similar outcome. The content reflects the personal views and opinions of the participants. No attorney client relationship is being created by this podcast and all rights are reserved.