



# DELAWARE

## EMPLOYMENT LAW LETTER

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### *AGE DISCRIMINATION*

## **Reducing the risks of a RIF: 3rd Circuit complicates the analysis**

by Scott A. Holt

*The news that a company needs to trim its workforce no longer carries the stigma once associated with layoffs. Instead, more and more employers engage in periodic assessments of their workforce to determine which positions are expendable. But implementing a successful reduction in force (RIF) takes careful planning to avoid the inherent legal risks associated with such a task.*

### ***Gauging the impact***

Most companies are adept at determining which departments or positions are expendable and calculating the cost savings and operational impact associated with the layoffs. Companies also are very capable of developing the criteria for selecting individual employees to downsize, including common factors such as seniority, skill set, or job performance.

Yet many RIFs still result in legal challenges brought by displaced workers. Although no layoff is risk-proof, much of the legal exposure can be avoided by conducting a thorough adverse impact analysis (with your attorney, of course, so it's protected under

attorney-client privilege) to determine if there will be a disparate impact on any protected classes, including the most common protected category: older workers.

In most states, including Delaware, the relevant inquiry is whether the layoffs will have a disparate impact on employees who are 40 or older — which is the age group protected under the Age Discrimination in Employment Act (ADEA). However, a recent case from the U.S. 3rd Circuit Court of Appeals (whose rulings apply to all Delaware employers) should cause employers to rethink their analysis.

### ***3rd Circuit adds a new wrinkle***

In *Karlo v. Pittsburgh Glass Works*, a group of former employees who were terminated as part of a RIF sued their former employer for age discrimination. Each employee was older than 50 at the time of the layoff. The lower court determined that the employees' claims failed because once employees who were between 40 and 50 years old were factored into the statistical analysis, there was no disparate impact on employees who were 40 or older.

On appeal, the 3rd Circuit reversed the lower court's ruling and found that the former employees *did* have a claim under the ADEA. The court held that the RIF disproportionately affected employees older than 50 in favor of employees in their 40s. Notably, the court's decision is at odds with cases in which other appellate courts have found age claims to be viable only when they're based on the entire protected group (employees who are 40 or older). *Karlo v. Pittsburgh Glass Works, LLC*, No. 15-3435 (3d Cir., Jan. 10, 2017)

### ***Bottom line***

Karlo decision is significant because employers in Delaware can no longer rely on an adverse impact analysis that merely looks at whether layoffs will have a disproportionate impact on employees who are 40 or older. Instead, you should now conduct "subgroup" disparate impact age analyses of layoffs. Your analysis should include a review of the

proposed layoffs to determine whether they will have a disparate impact on employees in specific age groups (e.g., 50 and older, and 60 and older).

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