# Employment Law Corner

## Monthly Report

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**April Updates**



## "We're At-Will" Isn't Enough: The Hidden Risks of Terminations, RIFs, and Furloughs

Every employer eventually faces the difficult decision to let someone go. Workforce separation decisions, whether individual terminations, large-scale reductions in force, or temporary furloughs, are among the most legally consequential actions an employer can take. Each carries distinct procedural obligations, documentation requirements, and litigation exposure that extend well beyond the business rationale underlying the decision. Careful planning, risk analysis, and documentation are critical to proactively mitigate exposure before it becomes a claim.

### Threshold Distinctions: Termination, Reduction in Force, and Furlough

These workforce actions are legally distinct and conflating them creates risk.

- A **termination** is a permanent separation from employment, whether for cause – because of performance deficiencies or misconduct – or without cause under the at-will employment relationship.
- A **reduction in force** (RIF) is a workforce action involving the elimination of positions, typically impacting multiple employees and driven by organizational or financial considerations rather than individual performance or misconduct.
- A **furlough** is a temporary, involuntary leave of absence during which the employment relationship is preserved. The employee is expected to return, benefits may continue, and the separation is not legally characterized as a termination.

  The distinction is not merely semantic. Each action carries different statutory obligations, different documentation standards, and different types of exposure. Characterizing a RIF as a series of individual terminations, for example, may be construed as an attempt to circumvent WARN Act notice obligations. Similarly, a furlough that is implemented without necessary safeguards may actually be considered a termination, triggering corresponding obligations.

## The Limits of At-Will Employment

At-will employment permits the employer, or the employee, to terminate the employment relationship at any time and for any *lawful* reason. The operative limitation is the word "lawful." Several well-established legal constraints restrict at-will authority and are often the basis of employment litigation.

- **Discrimination Claims Under Federal and State Law**: Employers may not terminate employees based on protected characteristics, even in at-will relationships, and they must have clear written documentation evidencing a legitimate non-discriminatory reason for the decision or they face liability under federal and state law. A lack of contemporaneous documentation significantly increases the risk that the decision will be viewed as pretextual, and plaintiffs can rely on circumstantial evidence to proceed to trial.

- **Implied Contract Claims:** Written communications, such as handbooks, offer letters, and manager statements can create implied obligations that limit at-will status. If an employer bypasses a promised process like progressive discipline, it may face breach of contract claims. Employers should regularly audit materials to avoid unintentional limitation of their at-will rights.

- **Retaliation Claims:** A termination that follows closely on the heels of protected activity - such as filing an internal complaint, requesting FMLA leave, or asserting a wage claim - creates substantial exposure for retaliation. Courts and juries routinely treat close timing as circumstantial evidence of retaliatory motive. Employers should clearly document an independent, legitimate business reason for the termination and ensure the timing does not give rise to an adverse inference of retaliation.

## RIF Considerations

- **WARN Act Notice Obligations:** Covered employers, generally those with 100 or more full time employees, must provide advance written notice before a plant closing or mass layoff. Employers must also comply with state mini-WARN laws, which often apply to smaller workforces and impose broader coverage. Failure to comply can result in significant liability.

- **Disparate Impact Analysis:** Before executing a RIF, employers should conduct a disparate impact analysis of their proposed selection criteria. This involves an analysis of the employees selected for separation compared to those retained to identify any disproportional impacts on protected groups, which could give rise to liability under Title VII or the ADEA.

- **Severance Agreements and OWBPA Compliance:** When conditioning severance on a release of claims for employees age 40 or older, employers must comply with the OWBPA, which requires inclusion of specific ADEA language, a 21 day review period (45 for group layoffs), a 7 day revocation period, and, in group layoffs, disclosures on the decisional unit, selection criteria, and the ages and job titles of those selected and not selected.

## Furlough Considerations and Common Errors

While often seen as lower risk than permanent layoffs, furloughs carry distinct legal risk.

- **FLSA and Exempt Employees:** Exempt employees must receive full weekly salary for weeks in which any work was performed. Furloughs shorter than a full workweek can jeopardize exemption status and trigger overtime liability.
- **Benefit Continuation:** Communications about the furlough must clearly address impacts to benefits. Failure to maintain benefits or provide required notices, such as under COBRA, creates liability.
- **Risk of De Facto Termination:** Extended furloughs, loss of benefits, or communications implying permanence can suggest the workforce action is a termination, resulting in termination-related legal obligations.

## Document, Document, Document

High-quality, contemporaneous, and consistent records are critical across all workforce actions and often determine litigation outcomes.

- **Terminations**: Ensure there is written documentation including performance evaluations, corrective actions, progressive discipline, and manager notes supporting the decision.
- **RIFs**: Document pre-established selection criteria, disparate impact analyses, and the business rationale.
- **Furloughs**: Include written policies on duration, benefits, return-to-work conditions, and employee acknowledgment.

  Courts and plaintiffs scrutinize inconsistencies, such as favorable prior evaluations contradicting a termination or RIFs disproportionately affecting protected classes. Thorough documentation not only strengthens legal defense but also enforces disciplined decision-making, reducing the risk of actionable errors.

## At Foley & Foley, We Are Here to Help

Before executing a workforce action, a brief consultation with one of our attorneys can prevent exposure before it becomes a claim. We encourage employers considering workforce separations to consult with our Workforce Law Group ***prior to*** taking action. Our attorneys can help every step of the way to ensure the workforce action is being conducted lawfully. Remember: early engagement is critical.

***Who We Are:***

*We exclusively represent employers, from coast to coast, and in all facets of employment law and litigation. Our mission is solving problems and anticipating issues so you can concentrate on your business.*

*We are constantly monitoring trends and upcoming issues in the law that impact our clients. We want our clients to be informed and ready. Our familiarity with the workplace and our approach sets us apart from other law firms, making us well equipped to handle your unique needs.*

*We are not like other firms: Anyone can tell you what the law says. That is easy. We find creative solutions to advance your goals while minimizing risk to your organization. Learn how we can help your business:* ***Foley & Foley PC attorneys specialize in Employment and Labor Law in the Public and Private Sectors (foleylawpractice.com).***

*This update is for informational purposes only and does not constitute legal advice. For guidance specific to your organization, please contact your employment counsel.*

## Meet Martine Wayne

Martine concentrates her practice on advising and representing businesses on a wide range of labor and employment matters. Her experience includes employment litigation and providing strategic guidance on matters such as discrimination, wage and hour compliance, leaves of absence, terminations and employment policies and agreements. As the Leader of the Firm's Employment Law Audit Services, Martine helps organizations, both small and large, proactively identify and address labor and employment risks before they escalate. Check out her full bio here!


### Contact Us

FOLEY & FOLEY PC
ATTORNEYS AT LAW

www.foleylawpractice.com

info@foleylawpractice.com

(844) 204-0505