RIF à la Carte: Using Reported Cases To Develop Effective Reduction-in-Force Criteria

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Companies facing reductions-in-force know that they need to make intelligent and legal decisions about which employees to keep and which to let go. Too often, however, companies are both unsure and unaware of the different types of criteria that they may use to do so. This article examines and categorizes a variety of RIF criteria from reported court decisions and concludes with a multi-step process by which appropriate RIF criteria may be developed in individual situations.

With the downturn in the economy, many employers are, or will be, facing reductions-in-force.[1] Employers realize that, invariably, RIFs mean comparing employees and making decisions regarding who will stay and who will go. Given that RIFs are not an everyday occurrence, however, many employers are unaware of the variety of criteria that they may use in conducting RIFs. They may have an inaccurate view of which criteria are legal and which are illegal. These concerns may be further accentuated by the litigation and negative press that certain employee-comparison models—such as those used by Ford Motor—have recently received.[2]

This article begins by examining reported RIF cases, focusing in particular on those cases where it is clear that the company has used specific criteria,[3] other than strict seniority,[4] in making RIF decisions. Most of those cases, as one would expect, involve claims of age discrimination. The examples used involve only those cases where the RIF criteria appear to pass muster—in most of these cases the court has dismissed the plaintiff's lawsuit; in an isolated few, the court has denied summary judgment but has done so on grounds other than

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the RIF criteria.[5] This article relies, of course, on the courts to have accurately reported the company's criteria. Cases where there is any doubt in that regard have also been excluded.[6]

RIF CRITERIA MODELS

When examined and compared to one another, RIF approaches may be thought of as falling in seven different categories. Those categories, arranged roughly in order from most-involved to least-involved, include:

- Multiple-Factor Matrix
- Multi-Level
- Skills Only
- Performance Only
- Totem
- Least-Impact
- Miscellaneous

These seven categories are explained in the following sections in this order. Within each category, different company approaches are described, in alphabetical order. The focus of each is on the criteria used by each company for making RIF decisions. Some introduction regarding the background of the RIF, as well as the outcome of the litigation, is also included.

Other issues that are typically part of an overall RIF strategy—such as voluntary retirement/severance programs,[7] bumping rights,[8] review committees,[9] and safeguards to prevent discrimination[10]—are not included. Cases that discuss the RIF process, but do not offer much insight into the selection criteria, are also not included.[11]

MULTIPLE-FACTOR MATRIX

The most common approach in conducting a RIF is to use a multiple-factor matrix. At the most basic level, a multiple-factor matrix involves selecting criteria, scoring the competing employees on those criteria, and tallying the scores. In the multiple-factor matrix, a number of criteria are used. These criteria almost always include both performance and skills components. "Performance," as used throughout this article, refers to how well an employee performs. "Skills," on the other hand, refer to the abilities that an employee possesses.

The variations among these multiple-factor RIF programs begin, but do not end, with the difference in criteria. They also vary in terms of the number of criteria, the specificity with which they are defined, and the points or weight to be awarded under each. There are even differences in how the tabulated points are used. As indicated above, points are typically totaled and compared. Other options, however, include: considering the point totals along with other information to come up with rankings; using complicated formulas; using certain criteria as "tiebreakers"; and even taking the points and plotting them along the vertical axis of a matrix from which terminations are made in a specified pattern.

A number of interesting multiple-factor programs are described below.[12]

Alliant Techsystems

In late 1992, Alliant's CEO asked top-level administrators to prepare proposals for a reduction of administrative personnel. Each department received a "projected headcount reduction" specifying how many positions were to be eliminated.

Alliant's workforce reduction criteria provided that employees were to be ranked and terminated based upon five criteria:

- performance rating
- performance ranking
- critical skills
- cross-functional capabilities
- leadership

The highest score for any individual criterion was five points, with a total possible score of 25 points.

The following information is available regarding some of the scores under "cross-functional capabilities":

2— demonstrated ability to absorb small increments of additional/new responsibilities within the same function

3— demonstrated ability to absorb additional/new major work responsibilities in cross-functional area

4— demonstrated ability to assume responsibilities of a complex nature in more than one functional area; evidence of previous successful cross-functional experience

Two employees affected by the RIF brought age discrimination lawsuits under the ADEA and the Minnesota Human Rights Act. They claimed that they had been unfairly ranked, and that the RIF process had an adverse impact on those over 40. In strongly worded language recognizing the employer's right to evaluate employees in a RIF, the Eighth Circuit affirmed summary judgment for the defendant.[13]

Bell Atlantic

In early 1993, Bell Atlantic began to restructure along lines of business, rather than geographical areas. As part of that process, the company decided to eliminate two first-level manager positions in its New Jersey Finance Department. The human resources department provided the head of that department with Selection Criteria Worksheets. The worksheets used four weighted factors in assessing each employee:

- job performance (30%)
- technical skills (45%)
- culture change skills (15%)
- leadership results (10%)

An employee who was selected for RIF brought a variety of discrimination and tort claims. Bell Atlantic, however, prevailed on its motion for summary judgment.[14]

EG&G Mound Applied Technologies

EG&G Mound Applied Technologies, Inc. (EG&G) operated a facility in Miamisburg, Ohio which was historically used for nuclear weapons production and the production of radioisotope thermoelectric generators for the Department of Energy. In late 1994, however, the weapons production budget had been terminated and EG&G began to convert the facility to industrial production.

In anticipation of a RIF, EG&G began evaluating employees for termination. Employees were evaluated and ranked according to a performance matrix. The matrix assigned employees points in a number of categories including:

- performance of specific tasks and responsibilities assigned to the individual

- knowledge of performance towards meeting overall programmatic goals
- productivity
- team contribution
- performance rating from previous evaluation
- seniority
- additional consideration for contribution outside the specific functional area

Based on this, a group of employees were identified as "unfunded" and placed in a "resource pool."

A technician who had worked at the plant for 18 years was among those found to be "unfunded." After she was laid off, she sued, claiming age and race discrimination. She based her suit on her claim that she should have been ranked more highly vis-à-vis another, less-senior technician and on the fact that some other employees who had lower matrix scores than her were retained. These arguments were unsuccessful and the court granted the employer's motion for summary judgment.[15]

General Electric

In the 1990s, GE conducted RIFs in various divisions pursuant to a written RIF policy. The policy suggested that managers group their employees into peer groups, rank them according to a matrix, and eliminate a certain number. Managers rated employees on four criteria:

- historical performance
- flexibility of knowledge and skills
- criticality of skill
- length of company service

With the exception of length of company service, each criterion was ranked on a scale of one (worst) to five (best).

With respect to the first criterion, historical performance, the RIF policy suggested that managers rate this by "focusing on documented performance appraisals (within the last 24 months), as appropriate." However, the policy also stated that performance should be compared "principally within the last 12 to 24 months." Finally, the instructions for the matrix stated that "the results of the ranking should be consistent with available documentation," and directed that the manager provide an explanation for any inconsistency.

The second criterion, flexibility, was intended to be a "comparison based upon the individual's breadth of knowledge and skills which would permit him/her to do a variety of tasks or jobs."

The policy defined the third criterion, criticality of skills, as the "importance of the skill to the remaining work to be performed by the affected component." The guidelines directed the evaluator to note actual specific skills required.

With respect to length of company service, the matrix gave employees no points if they had less than two years of service, one point for two to ten years, two points for ten to 20 years, and three points for more than 20 years of service.

In addition to granting points for seniority, the RIF policy favored very long-term employees in three additional ways. First, the policy instructed managers to break ties between employees based on length of service. Second, four levels of management—rather than the usual two—had to approve the layoff of any employee with more than 25 years of seniority. Finally, GE sought another placement option for employees who had 25 or more years of service.

GE faced litigation in several divisions regarding these RIFs. An employee in its Aerospace Division in New York who was among the employees selected for RIF, for example, sued for age discrimination. At the close of discovery, GE moved for summary judgment. The court denied the motion. It did so not based on any inherent flaw in the RIF criteria, but rather because of facts such as the manager's failure to adhere to RIF procedures and certain comments which the court believed were reasonably susceptible of an age-based interpretation.[16]

One of the employees selected for RIF in GE's electric lighting division also brought a claim of age discrimination. In that case, the court granted GE's motion for summary judgment.[17]

Hercules

Hercules is a manufacturer of chemicals and chemical products. As it moved into the 1990s, it instituted a series of RIFs. Employees in its Wilmington Research Laboratory were reduced by more than 50 percent between 1990 and 1996.

To administer the RIF, Hercules developed a written policy. With an eye toward "retention of the best workforce," Hercules identified the following RIF criteria:

- Job performance
- Prior experience, including the individual's versatility and flexibility in terms of known and demonstrated performance in other functional responsibilities
- Education applicable to the job
- Relative ability
- Physical limitations in performing a function other than that on which currently assigned (supported by medical documentation)
- Adjusted service date/then continuous service

If all of the above were equal, the Hercules RIF policy provided that date of birth would be a tie-breaker; that is, that the older employee would be retained.

One of the members of the Hercules Rubber Lab survived the 1991 RIF but was not so lucky in the 1994 RIF. He sued under the ADEA and a variety of state law claims. The district court granted Hercules' motion for summary judgment on all but the ADEA claim. The court denied summary judgment on the ADEA claim not because of any concerns about Hercules' RIF policy but rather based on the possibility that the plaintiff "could choreograph a tragedy at trial."[18]

Johnson Controls

In late 1993, Johnson Controls' NASA-related work decreased, necessitating a RIF of engineers.

A company official met with the heads of the three engineering departments at NASA to devise a system for evaluating the positions and engineers to be eliminated. They devised a matrix consisting of the following factors:

- Time
- Performance
- Teamwork
- Value/Job Knowledge
- Protected Class

The first factor, time, referred to seniority. Employees were given one point per year of service, up to a maximum of ten points.

The second factor, performance, was based on the employee's last performance appraisal, adjusted by changes since then. That factor had the highest weighting—35 points.

The third factor, teamwork, was designed to assess attitude, cooperation, and team effectiveness. The maximum for that factor was 20 points.

The fourth factor, value/job knowledge, was worth up to 25 points. Different levels were assigned different points: "average" was worth ten points, "strong" was worth 15 points, "specialist" was worth 20 points, and "expert" was worth 25 points.

The fifth factor, protected class, was all or nothing. If the employee was in a protected class, he or she received ten points.

The employees evaluated were classified into the following principal work groups: electrical, mechanical, civil, and spares. Engineers were evaluated within each job group, that is, civil engineers were compared to civil engineers.

A civil engineer selected for RIF filed a lawsuit alleging national origin discrimination and breach of contract. The court, however, granted Johnson Controls' motion for summary judgment on all claims.[19]

Lockheed Martin Energy Systems

Because of congressional budget reductions, Lockheed Martin Energy Systems (LMES) engaged in several RIFs between 1995 and 1998. Starting with the first RIF, the company developed guidelines to assist in the selection of employees for termination.

First, the LMES guidelines provided for determining the number of surplus positions given current budget restrictions. Second, these jobs were studied and those that could be eliminated were identified. Following this, relevant peer groups (employees within the same classification who perform the same or similar work) were identified. Third, employees within each group were ranked based on six criteria:

- possession of critical skills
- performance reviews over the previous three years
- education/training relevant to the job
- transferability of job skills
- length of service
- time in position

The various organizations within LMES were apparently responsible for developing their own formulas under these six criteria. The Analytical Services Organization (ASO), for example, used a scale which required the evaluator to rank the employee on a scale of one-to-ten on each criterion and multiply that ranking by the weight assigned to the criteria.

Under the first criterion, critical skills, the evaluator was asked to consider all of the following: uniqueness, importance of specialty to organization, difficulty of replacement, knowledge of assigned work, principal trainer, problem solving, accountability, professionalism, teamwork, and responsibility/initiative. The ranking on this criterion was then multiplied by a weight of 20.

For the second criterion, ASO developed a chart which took the last three overall performance ratings into account. Those past ratings ranged from highest to lowest as follows: distinguished service (DS), consistently exceeds (CX), consistently meets (CM), and needs improvement (NI). The chart awarded points from one-to-ten as follows:

10 = 3 DS
9 = 2 DS, 1 CX
8 = 1 DS, 2 CX
7 = 3 CX or 1 DS, 1, CX, 1 CM
6 = 2 CX, 1 CM or 1 DS, 2 CM
5 = 1 CX, 2 CM
4 = 3 CM
3 = 1 CX or 2 CM
2 = 1 CM
1 = NI w/no CX in last 3 yrs
0 = 2 NI

Those points were then multiplied by a weight of 20.

The third category, called education/training, also assigned points based on a chart. Those points were assigned as follows:

0 = Not relevant
1 = High school
2 = 1 year of college
3 = 2 years of college
4 = associate degree or non-relevant bachelor of science degree
6 = bachelor of science degree
8 = Masters degree
10 = PhD

The points were then multiplied by a weight of 15.

The fourth criterion, transferability of job skills, did not utilize a chart. It considered both: (a) the number of relative procedures or work areas (such as supervision, program manager training, lab analysis, sampling, and word processing) in which the employee was proficient; and (b) the employee's ability to apply job skills to other areas. Once again the employee was assigned points from one to ten. Those points were then multiplied by a weight of 15.

With respect to the fifth criteria, length of service, LMES also used a chart. An employee received one point for each three years of service, up to maximum of ten points. That chart looked like this:

1 = 0-3 years
2 = 4-6 years
3 = 7-9 years
4 = 10-12 years
5 = 13-15 years
6 = 16-18 years
7 = 19-21 years
8 = 22-24 years
9 = 25-27 years
10 = 28-30 years

Those points were then multiplied by a weight of 25.

The sixth and final criteria, time in position, did not use a formula. It simply assigned one point per year up to a maximum of ten.

A RIFed analytical chemist brought suit under the ADEA. He argued that he did not get the correct score in certain areas like education and service, attacked the subjective nature of the first and fourth criteria (which LMES admitted), and further claimed that the company had subjectively manipulated the other criteria to discriminate on the basis of age. The plaintiff did not prevail, however, and his case was dismissed on LMES's motion for summary judgment.[20]

McDonnell Douglas—Business Operations

McDonnell Douglas had a RIF in its business operations department in August of 1992.

Supervisors were instructed to evaluate employees, relative to one another, based on four factors:

- technical capability
- skills applications
- personal commitment
- team building

The next-level supervisor then took the scores and used them, together with the employee's most recent documented performance evaluation and his or her five-year merit increase history, and compiled a ranking. The ranking was used to make termination decisions.

A RIFed production engineer sued under the ADEA. McDonnell Douglas prevailed on its motion for summary judgment.[21]

McDonnell Douglas—A-12 Program

McDonnell Douglas also conducted a RIF in its A-12 program in 1992, in response to the Department of Defense's termination of the A-12 contract.

In order to effectuate its 1992 employee-reduction goal, McDonnell Douglas instituted a program called "Relative Assessment Scoring." Under this program, individual managers were asked to assign rankings to their employees with respect to a variety of specific factors, including:

- present performance
- past performance
- merit pay increases
- responsibility
- experience
- leadership
- education and training
- personal commitment

Each ranking corresponded to a specific number of relative assessment "points," the sum of which constituted the employee's overall relative assessment score.

The relative assessment program weighted present performance much more heavily than past performance: only ten relative assessment "points" were available for past performance, while 26 were available for present performance.

A RIFed employee (who had ranked fifth from the bottom of 155 employees working in procurement) sued, claiming age discrimination. His claim was dismissed on the defendants' motion for summary judgment.[22]

NationsBank

NationsBank of Florida conducted a RIF in June of 1995.

To determine which employees would be retained following the RIF, unit supervisors evaluated each of their employees in the following areas:

- performance history
- competencies
- skills
- ability to satisfy the requirements of the new position

Upper management then reviewed the evaluations and "stack ranked" all of the employees; that is, the highest ranking employee was placed in the number 1 spot, and so on. This ranking was then used to determine who would be terminated.

One of the affected employees sued under the ADA and ADEA claiming, among other things, that NationsBank had used a subjective and discriminatory "stacked" ranking system. The court, however, granted the bank's motion for summary judgment.[23]

New York City Transit Authority

For budgetary reasons, the New York City Transit Authority underwent an organization-wide RIF. To comply, the "Material Division" decided to eliminate six procurement specialists. To make such terminations, a task force was created to design a ranking system.

The ranking system scored employees in ten weighted categories. The categories included:

- job knowledge
- education
- experience
- computer skills
- absenteeism
- communication
- initiative
- analytical/interpersonal skills
- quality of output
- quantity of output

These ten categories were not equally weighted. The first four categories—job knowledge, education, experience, and computer skills—were given a weight of 5. The next four categories—absenteeism, communication, initiative, and analytical/interpersonal skills—were given a weight of 10. The final two categories—quality and quantity of output—were given the highest weight of 15.

Employees were evaluated in each category and given a score of one to eight points in each category. Those scores were then multiplied by the category's weight. Finally, the ranking system added the weighted scores in each category and the six employees with the lowest total scores were terminated.

In evaluating an employee's education, college graduates received a "good or better" resulting in 20 or more weighted points. Employees with some college work but no degree received a "marginal" rating yielding between 15 and 20 weighted points. Employees with only a high school degree, however, received a rating of "poor" giving them only 10 weighted points. In evaluating experience, the ranking system credited other "transit" experience beyond that gained in the Material Division.

One of the impacted employees sued for age and race discrimination. She claimed, among other things, that her RIF scores on job quality and initiative were inconsistent with her last performance appraisal. The court, however, found that there were no inconsistency and granted summary judgment for New York City Transit Authority on all claims.[24]

New York State Electric & Gas (NYSEG)

In November 1993, NYSEG announced that it would significantly reduce its workforce by mid-1994 in an effort to cut costs.

As part of its involuntary RIF procedures, NYSEG's human resources department devised a policy and procedure to assess each salaried employee as to their past skills and performance, with an eye toward predicting future performance. This procedure involved the utilization of performance ratings for the previous four years (1990-93), which were maintained by NYSEG on a yearly basis. The formula used subtracted the percentage by which the employee did not meet expectations in a given review period from the percentage by which the employee exceeded expectations in that period. The difference was then divided by the number of reviews used. The resulting percentage was then assigned a score and weighted; these calculations were contained on an individual assessment form ("IAF"). The IAF also contained spaces for scores on qualities such as interpersonal skills, leadership, flexibility, and risk-taking. These scores were to be estimated by an employee's supervisor. The score resulting from the performance reviews, along with the ratings on the several qualities, were weighted and added to come up with a "skills assessment rating" for each employee. The ratings ranged from 400 to over 600.

One of the impacted employees sued under the ADEA. His case proceeded to a bench trial, where the district court ruled in NYSEG's favor.[25]

Puerto Rico Sun Oil

In an effort to downsize, Puerto Rico Sun Oil compressed seven emergency response technicians' positions into five. To determine whom to terminate, employees were evaluated and rated based on seven criteria including:

- experience
- education
- training
- job performance
- effectiveness
- computer skills
- other strengths

The employees with the lowest rankings were terminated.

One of them sued, claiming that the rating system was a sham and that he was selected for termination because of his age. The district court granted summary judgment, noting that the company had devised a neutral rating system. The First Circuit affirmed.[26]

Unisys

In 1986, Burroughs Corporation merged with Sperry Corporation to form Unisys. Unisys, a computer and computer products company, underwent considerable economic strain following the merger. In reaction to its financial problems, Unisys instituted cost-reduction measures that resulted in a large reduction in its workforce. Unisys reduced its workforce from more than 120,000 employees in 1986 to fewer than 60,000 employees in 1992.

Beginning in 1988, Uniysis decided to change from seniority-based layoffs to a skill and performance based system for RIFs. It adopted a policy which based retention decisions on the following four factors, in descending priority:

- demonstrated performance;
- skills mix;
- length of experience; and
- length of service, as a tiebreaker

In other words, length of service was to be the deciding factor if the first three factors were equal for all the employees in question. In assessing the first factor, only the employee's last two performance reviews were to be consulted.

Unisys was sued but prevailed in several lawsuits attacking these RIFs.[27]

Xerox

In the fall of 1993, Xerox announced plans for a corporate-wide RIF of about 10,000 employees. Each organization within Xerox was responsible for determining by how much to reduce its workforce. All those that did eliminate positions, however, utilized the same decision making process.

Within each work unit, immediate supervisors ranked employees in the following four categories:

- work quality
- work speed
- work orientation
- work skills

The "work quality" category purported to measure reliability and accuracy as well as use of methods, tools, and processes. The "work speed" category measured the employee's ability to plan, prioritize, execute a plan, and meet due dates. The "work orientation" category included action orientation, business orientation, team orientation, and customer orientation. The fourth and final category, "work skills," was intended to assess adequacy, self-development, and continuous learning.

Within each category, employees were given a score of 0 to 5, for a potential total of 0 to 20 points. Scores were then entered onto a "Contribution Assessment Form" (CAF) and reviewed by senior managers to ensure fairness and consistency.

After scoring, employees were stack-ranked on a matrix against other employees within their respective work-units. The vertical axis of the matrix represented the employee's total CAF score and the horizontal axis represented years of service at Xerox, either less than 20 years or greater than or equal to 20 years. Selections for termination were then made in a pattern of assessment score/tenure combinations which favored employees with greater years of service with the exception of certain employees with special skills. A certain percentage of low-ranking employees were then selected for termination.

A group of RIFed employees brought a variety of discrimination claims against Xerox. Xerox defeated all of those claims, and the Second Circuit affirmed summary judgment in its favor.[28]

Xerox—National Account Managers (NAMs)

Xerox also went through a RIF involving its national account managers in late 1993 and early 1994. In determining which managers to eliminate, the company utilized a formula that added years of service to numerical scores from performance appraisals over the previous three years. The resulting sum was then multiplied by an attribute assessment score which considered a NAM's rating in the following categories:

- customer driven approach
- decision-making
- drive for business results
- use of leadership through quality
- personal strength and teamwork
- managing operation performance
- overall technical knowledge

One of the NAMs, who had scored last out of the 27 NAMs ranked, sued for age discrimination. Xerox prevailed on its motion for summary judgment.[29]

MULTI-LEVEL

The second category of RIF procedures may generally be referred to as "multi-level." RIF procedures which use multi-level criteria resemble a multi-factor matrix in the sense that multiple factors are used. They differ, however, in that they use a *successive* series of criteria.

The two case studies described in this section both use successive series of criteria. These series, however, are used in different ways. In the first example, the first criterion is used to "narrow the field" to those who might be RIFed. Then, in the next level, that smaller group is compared using a set of other criteria. All of the criteria are used, at least with respect to the small group.

In the second example, not all of the criteria are used for each employee. Rather, the first criteria serves a "gatekeeping" function—only if the employee "passes" that criteria does he or she proceed to the next criteria (or set of criteria).

Illinois Bell Telephone

In an effort to streamline business and become more competitive, Illinois Bell underwent a "Workforce Resizing Program" in 1992 resulting in the termination of numerous low-level managers. The RIF was implemented in two phases.

During phase one, "at risk" managers (the bottom 25%) were identified by each department. They were identified by including anyone who had not received a merit-bonus award for the previous year. Once identified, these at-risk managers were given the option of accepting a voluntary termination package, applying for a transfer to a craft position, or assuming the risk of possible termination.

Phase two involved the ranking of each manager identified as "at risk" based on several criteria including:

- 1992 performance evaluations
- potential
- quality and quantity of experience
- specialized training or technical knowledge
- formal education

Each department was given discretion to determine what weight to give to each criterion in this second phase. As an example, the Customer Services department decided to weigh each criteria as follows: 50% 1992 performance, 20% potential, and 30% the remaining criteria. To prepare for ranking, upper level managers completed "Supervisory Update Forms." A meeting was then held during which the relevant criteria were explained, the update forms discussed, and the at-risk employees separately ranked by managers. Rankings were then collected and compiled into a final result. A facilitator aggregated the rankings that each entry-level manager had given and then divided that number by the number of raters. The person ranked first was considered most vulnerable to termination.

One of the managers, who was labeled at-risk and then identified as third most vulnerable out of his peer group of 14, sued under the ADEA and ADA. Illinois Bell won its motion for summary judgement, which was affirmed on appeal.[30]

Royal Indemnity

In May of 1993, after several years of disappointing financial results, Royal Indemnity retained McKinsey & Associates to conduct an operational review of the company's headquarters operations. Specifically, McKinsey was to define the role of the headquarters operation by reducing its functions to the essential tasks. To do so, McKinsey relied on a methodology know as activity valued analysis ("AVA"), implemented in several distinct phases.

As part of the AVA process, changes were implemented resulting in fewer jobs than qualified employees. In those situations, the company compared candidates using an established decision matrix of skills, performance, and seniority.

Unlike the matrices described earlier, all of these items were considered in a particular order, and not all at once. The company first examined each employee's skills in light of the position in question. If the decision could be made on the basis of skills, it was. If not, the company next considered each employee's performance. If the decision could be made on that basis, it was. If performance was equal, however, the company then compared the respective seniority of the employees.

Given the reduction in positions, the Assistant Director of Marketing Research and his boss, the Director, were compared for a management position. The decision to keep the Director was made at the very first level of analysis; that is, on the basis of skills. The Assistant Director sued under the ADEA and the court granted Royal Indemnity's motion for summary judgment.[31]

SKILLS ONLY

The third RIF model may best be described as skills only. Next to the multi-factor approach, this appears to be the second most popular RIF selection process. The focus is on what the employee can do. These skills are often quite specific—even more so than in the multi-factor approach—and are tailored to the needs of the business.

Aetna Casualty

In July of 1991, Aetna underwent a major reorganization, including a RIF. Positions were eliminated and new jobs created.

To rank candidates, Aetna used a Competency Worksheet, designed by Aetna's home office in Hartford, Connecticut, which assessed an employee's situational competencies in the following areas:

- agency management skills
- agent recruitment/selection/training
- advanced marketing techniques
- life product knowledge
- life marketing concepts/programs
- technical life insurance sales knowledge
- life industry/competitor knowledge
- risk taking
- self-motivation

The candidates were ranked from 1 (demonstrating a limited command) to 5 (demonstrating superior command). The new jobs were offered to the highest ranking candidates on these worksheets.

A product development manager was RIFed and sued under the ADEA. He attacked not only his ranking but also the process, which he claimed was subjective, inconsistent, and ambiguous and had a disparate impact based on age. Aetna moved for summary judgment, however, and prevailed.[32]

GE Astro Space

In September of 1991, GE laid off approximately 1,000 employees in its Astro Space Division.

Pursuant to its RIF policy, GE laid off employees based on their relative rankings on a scoring matrix. Employees were ranked in various categories including, but not limited to, skill areas such as:

- leadership
- communication
- analytical skills
- team skills
- customer, vendor, and internal interface

A RIFed quality control manager brought an age discrimination and retaliation lawsuit. GE filed a motion for summary judgment, most of which was granted.[33]

Gulfstream Aerospace

Gulfstream conducted a RIF in late 1993. Gulfstream did so by evaluating the employees against a "skills matrix," which considered skills required to accomplish the department's continuing mission. Gulfstream ranked the employees against this skill matrix and used seniority as the tiebreaker.

The department supervisor was responsible for developing the list of skills and equipment on which the employees would be graded. For each skill listed, an employee received one point if he possessed the skill and no points if he did not. Each employee's proficiency on a given piece of equipment was graded on a scale of one to three. An employee received three points if he was totally proficient, two points if he was simply capable of using the equipment, and one point if he could not use the equipment at all. The total points awarded for the equipment and skills identified were then combined to arrive at each employee's overall score.

One of the RIFed employees in Department 432—a tool and cutter grinder—filed ADEA and race discrimination claims. Gulfstream filed for summary judgment, however, and prevailed.[34]

PPG Industries

PPG manufactures glass, paints, coatings, and chemicals for residential and commercial customers. Between 1988 and 1990, PPG shut down a number of its glass manufacturing plants in its Western region. Near the end of that time, company officials force ranked all purchasing agents within the Western region. They were ranked based on the following criteria:

- working relationship with the corporate purchasing department
- plant purchasing experience
- knowledge of the glass purchasing group
- knowledge of, and compliance with, purchasing procedures
- communication skills
- ethical standards
- systems literacy

- interpersonal skills
- negotiating skills
- education
- purchasing certification
- work ethic
- geography
- potential for promotion

One of the regional buyers filed an age discrimination claim. Summary judgment was entered for PPG but was reversed on appeal by the Seventh Circuit. The Seventh Circuit based that decision, however, solely on alleged age-based remarks by the decision-maker and not on the company's ranking system or on the plaintiff's claims he had been improperly ranked.[35]

Prudential Relocation

Prudential Relocation reduced its staffing at its Kodak relocation center in January of 1995. All 19 employees at the center were ranked based on four criteria:

- quality of customer service
- focus on results
- ability to complete tasks under pressure and work in a timely fashion
- adherence to core values and company policy.

The nine employees with the lowest rankings were terminated. Five of those individuals sued, claiming age and other forms of discrimination. Their claims were dismissed, however, on Prudential Relocation's motion for summary judgment.[36]

Quaker Oats

In 1994, Quaker underwent a RIF in its sales organization. To select which employees would remain, a human resources team was sent to rate employees in several categories. Most of those categories emphasized analytical skills developed through headquarters (management) work. Employees were ranked in six specific categories:

- strategic business planning
- advanced fact-based selling

- category expertise
- customer operations
- leadership ability
- communications skills

Employees were further evaluated in learning agility (that is, the ability to learn from past mistakes) and versatility. The evaluators were directed to ignore previous performance assessments, as well as such criteria as seniority, years of service, and experience.[37]

One of the RIFed employees—Quaker's only area retail manager—filed claims of age and race discrimination. The district court granted Quaker's motion for summary judgment and the Ninth Circuit affirmed.[38]

PERFORMANCE ONLY

This fourth category of RIF models is the mirror image of the preceding category. This category includes those companies whose RIF criteria focus exclusively on performance. Unlike those systems which expressly distance themselves from past performance appraisals,[39] these systems often use those performance appraisals, either as the direct basis for ranking employees or, in some cases, as the reference tool for ranking employees on certain criteria.

Aetna Casualty

In December 1991, Aetna announced another phase of their corporate reorganization, in an attempt to create a "flatter" organization.

To obtain this objective, the company eliminated several thousand positions and created new positions that combined the job functions of the old positions. The company used a ranking process to select the best-qualified person for each new position. The home office in Connecticut identified and assigned weights to four or five "critical skill competencies" for each new post-reorganization position, and assigned lesser weights to the other competency categories. Depending on the position, "critical skill competencies" might include items like leadership, communication skills, and/or building teamwork. The branch offices were responsible for selecting a slate of candidates for each post-reorganization position. Every employee whose job responsibilities in the prior organization were similar to the responsibilities in the post-reorganization positions was automatically included on the slate.

The branch offices used the employees' most recent Performance & Development Reviews to ascribe numerical scores for each of the critical competencies. The slated candidates were then ranked according to their numerical scores, from highest to lowest, and placed on a Candidate Comparison Worksheet. There were separate Worksheets prepared for each post-reorganization position. The company offered the highest-ranking candidate on each of the Worksheets the post-reorganization positions.

One of the impacted sales employees sued for age discrimination. The district court, however, granted Aetna's motion for summary judgment and dismissed the lawsuit.[40]

Exxon Coal

As a result of a contract dispute with a major customer, Exxon Coal closed one of two coal mines in southern Illinois and laid off most of that mine's employees. Concurrently, the company decided to restructure operations and engage in a company-wide reorganization and RIF.

In deciding whom to retain, Exxon Coal opted to rely solely upon employee performance ratings from the previous year (1992). The company's performance rating system assigned employees an annual "Rank Group Percentile" ("RG%"). This ranking is arrived at based on an evaluation of an employee's work relative to other employees in same or similar positions. A particular employee's rank therefore depends upon the quality of that own individual's performance compared with the performance of other employees doing the same job. An employee with a RG 100% was considered the best performer while an employee with a RG 1% was considered the poorest performer. Under this RIF, only those employees who had the highest RG% in 1992 were retained.

Two RIFed employees brought claims under the ADEA. They reached a jury on several of their claims but did not ultimately prevail. The Seventh Circuit affirmed the dismissal of those claims. Among other findings, the Seventh Circuit rejected the plaintiff's claims that the company had manipulated the 1992 ratings to discriminate against older employees.[41]

Wyeth-Ayerst Laboratories

In October of 1993, Wyeth announced its intention to undertake a nationwide internal review, known as the Organization

Effectiveness Program (OEP), so as to determine how to reform its operations and increase competitiveness. It hired McKinsey & Company, a management-consulting firm, to assist with this evaluation. As part of the OEP, McKinsey and Wyeth concluded that a significant and permanent reduction of Wyeth's sales force was necessary.

To effectuate this RIF, Wyeth targeted for termination those sales representatives with poor performance records. These persons were identified by examining five pieces of equally weighted information for each sales representative:

- 1993 overall performance appraisal rating score
- 1994 overall performance appraisal rating score
- dollar amount of first 1993 salary bonus
- dollar amount of second 1993 salary bonus
- dollar amount of first 1994 salary bonus

Salary bonuses were apparently based on sales productivity.

If three of these five numbers for a particular sales representative were "low," then he or she was designated for discharge. A "low" overall performance appraisal was defined as a 1 or a 2 on Wyeth's 1 to 5 scale.

A sales representative selected for RIF sued. Despite his multi-prong attack on his ranking under this RIF procedure, the district court granted the company's motion for summary judgment.[42]

TOTEM

All of the preceding methods have involved scoring employees on criteria and then ranking the employees based on their respective scores. The "totem" model for RIF criteria also ranks employees but essentially skips the "scoring" step. Rather, the company identifies the criteria which the decision-makers should keep in mind in placing the relevant employees directly on a "totem pole" (ranked from top to bottom).

A subset of these "totem" methods—the "combined" totem—is also represented in these examples. There, two separate totems are prepared—perhaps involving two separate groups of employees, or two separate criteria. Those separate totems are then combined or blended to arrive at a final totem to be used in making RIF decisions.

Bethenergy Mines

Bethenergy Mines implemented a RIF in August of 1990, in which they eliminated a number of section foreman positions. These foreman worked in two separate seams of the mine.

In preparation for the RIF, the mine manager requested the superintendents of each seam, shift foremen, and general mine foremen to rank all section foremen. These rankings were to take into account the section foremen's overall performance, considering such items as production, safety, compliance with laws and company regulations, as well as other performance factors. Some of those factors, such as initiative and leadership, were also factors reflected in Bethenergy's annual performance appraisals.

The superintendents, shift foremen, and general foreman did as they were told with respect to the section foremen under their command. Each assigned the number 1 to the section foreman whom they would retain if they could only retain one foreman, number 2 to the person they would retain if they could keep only one additional foreman, and so on, until each foreman was ranked. The rankers were told not to confer with one another while ranking their subordinates.[43]

The superintendents of the two seams prepared an overall ranking for each of the two seams by totaling the numbers of each foreman and arranging them in order of lowest to highest. They then separately each performed an overall ranking, dovetailing the results of the seams. The person deemed better would be given the number 1 ranking, and so on. During this combined ranking, the rankers did not change the results of the prior individual seam rankings. The superintendents continued down the list until they each had developed a combined overall ranking of the foremen from both seams.

Finally, the superintendents sat down together and mathematically tallied their separate overall rankings into one final combined overall ranking. In cases of a tie, length of service was deemed the determining factor. This list was used to make the RIF decisions.

Several section foremen who were selected for reduction filed suit under the ADEA. Bethenergy prevailed on its motion for summary judgment.[44]

Commonwealth Edison

Com Ed undertook a significant RIF in 1992. The scope of the RIF included Com Ed's Zion Nuclear Generating Station.

The Zion plant's management established a five-person RIF committee. The committee examined all positions at the station to determine which could be eliminated or consolidated. The committee was also responsible for reviewing all personnel to consider who might take early retirement or leave voluntarily.

Finally, the committee compiled two lists. The first listed the plant's poorest performers based on their annual performance reviews. The second list named the employees whose job responsibilities had been specifically tailored to their limited abilities. The committee then combined the lists and sought input from the line manager regarding the performance of each person on the list. This list was then used to make the RIF decisions.

One of the RIFed quality control inspectors sued under the ADEA. The district court granted summary judgment for Com Ed, and the Seventh Circuit affirmed.[45]

Honeywell

Honeywell's Military Avionics Division was directly affected by a reduction in military contract work beginning in the late 1980s. Over a period of six years, it went through a series of RIFs, and reduced its workforce by more than 50 percent.

To implement the RIFs, employees were placed on a "totem," or ranked, on the basis of their qualifications and length of service. An employee's qualifications included, among other things, performance and flexibility. The lowest-ranked employees were placed on a "surplus list" and eventually RIFed.

One of the Honeywell engineers, who had ranked sixth out of six employees on his totem, sued under the ADEA. Among other things, he complained that the company's reliance on "flexibility" caused it to discriminate on the basis of age. Honeywell filed a motion for summary judgment and won.[46]

Lanier Worldwide

Lanier Worldwide implemented a nationwide reorganization and RIF in February of 1993. That RIF included a reduction in the number of district service mangers (DSMs).

Lanier conducted the DSM RIF by considering two separate factors. First, Lanier compiled a stack ranking of all DSMs from a composite score. That score was based on the following:

- seniority with Lanier
- seniority as a DSM
- percentage attainment of annual operating plan for profit and revenue for the preceding two fiscal years

After this stack ranking was completed, Lanier considered overall performance evaluation ratings from the last four years. Presumably, the company adjusted the stack ranking where performance evaluations warranted it.

One of the persons who lost his DSM job was an African American. He brought a race discrimination claim. Lanier's victory on its motion for summary judgment was affirmed on appeal.[47]

LEAST-IMPACT

The basic idea in the "least-impact" RIF model is to eliminate those employees whose absence will have the least impact on the organization. Some general or specific criteria may be involved but, for the most part, these are very "loose" programs which are just one step above total management discretion. The following examples fall in this category.[48]

Ellerbe Becket

Declining revenues in 1994 led Ellerbe Becket, Inc. (an architectural firm) to reduce its workforce. The plan for reduction called for terminating employees based on several factors including:

- costs to the firm of the employee's compensation
- nature of an employee's work
- the employee's performance

In most cases, the overriding consideration under these criteria was whether there was enough work to justify the employee's continued employment. Ultimately, 94 employees were terminated.

One of the RIFed employees sued, claiming that the RIF process discriminated against him on the basis of age and disability. The case was dismissed, however, on Ellerbe Becket's motion for summary judgment.[49]

Ipanema Shoe

Poor financial performance and a desire to cut costs led Ipanema to reduce its workforce in early 1998. The Vice President of

Marketing Services and the General Manager of Customer Services met to discuss whom to lay off. They decided to chose to eliminate those individuals whose positions were either non-essential or duplicative. They terminated those employees whose departures would have the least effect on the company's day-to-day activities, and whose workloads could be absorbed by those remaining.

One of the employees who was RIFed because her work could be easily absorbed brought a variety of claims. Her race and national origin discrimination claims were dismissed.[50]

Seagate Technology

Seagate designs, manufactures, and markets hard disk drives for computer systems. It implemented a company-wide RIF in its Oklahoma City facility the Summer of 1991 to address an anticipated decline in profit margins.

In terms of verbal instructions, managers were told to cut a certain percentage of employees, but were not told who to select. They were told, in general, to select those who would least harm their department's ability to continue their operations. The company's specific RIF criteria were position elimination, performance, potential, and seniority, in that order.

Several different groups of employees—one group in manufacturing engineering and the other in design engineering—brought suits under the ADEA. Both groups prevailed in their jury trials. In both cases, however, the Eighth Circuit reversed the jury verdicts and entered judgment for Seagate.[51]

MISCELLANEOUS

This category recognizes the discretion employers have with respect to RIFs, and the fact that companies occasionally come up with systems that do not fall into any of the other six categories. The two systems addressed below, for example, rely in one case on a written test, and, in the other case, on employee self-evaluations.

Entergy Corporation

Entergy (formerly known as Arkansas Power and Light) owned several electrical generating plants. It conducted a RIF in May of 1995.

Entergy negotiated a side agreement to the existing collective bargaining contract with its union in connection with the RIF. That side agreement required all employees to take a selection test for determining who would be RIFed. Two aptitude tests were used: the Plant Operator Selection System (POSS) and the Power Plant Maintenance Positions Selection System (MASS). Entergy had used both tests for several years for hiring purposes. The tests were based upon a checklist of crucial work skills, which had been created by questioning plant operators and maintenance workers in fossil fuel plants across the country. Using this checklist, an experimental testing battery had been developed and sampled, then correlated to performance evaluations, to confirm that higher scores corresponded to better job performance. In the RIF procedure, employees were allowed to take the tests twice. An employee who failed both times, however, was terminated. Those who passed were retained and placed in jobs according to seniority.

Several African-American employees who failed the test brought race discrimination claims. Entergy prevailed on its motion for summary judgment and the Eighth Circuit affirmed.[52]

New York Times

Decreasing advertising revenue and the recession of the early 1990s led to organizational restructuring in the Newspaper Division of the New York Times. In 1995, the Times determined that another RIF was needed in the Circulation Department.

In the involuntary portion of the RIF, employees were asked to complete qualification surveys grading their work on a scale of 1 to 5. A "5" indicated work exceeding requirements, "3" meant work meeting requirements, and "1" indicated work that did not meet requirements. Employees were offered training to aid them in completing the surveys. They were also given a chance to meet with a human resource representative who could further help explain the surveys. Employees' direct managers were also asked to complete performance review of their employees. Based on these, the vice presidents of circulation then made final termination decisions.

A group of nine RIFed employees brought suit under a variety of state and federal anti-discrimination laws. Among other things, they attacked the selection process as "hasty and superficial." The district court granted New York Times' motion for summary judgment.[53]

RECOMMENDATIONS FOR DEVELOPING RIF CRITERIA

As these examples show, there is no one-size-fits-all when it comes to RIFs. While many of the companies profiled were responding to the same market conditions—such as the recession in the early 1990s and defense spending cuts—all have had unique approaches to their RIF criteria. Some companies—such as General Electric, McDonnell Douglas, and Xerox—even appear more than once, showing that they have not used the exact same criteria in every RIF they have undertaken. Indeed, they sometimes have not even used the same RIF model from one RIF to the next. While GE's Aerospace and Lighting divisions used a multi-factor matrix, for example, GE's Astro Space division used a skills-only model.

Despite the variety of models and criteria, there is a constant in these reported cases: strong support for company discretion in conducting a RIF. Many of these decisions, for example, explicitly recognize a company's right to conduct a RIF.[54] Similarly, these decisions recognize the company's right to select the criteria, including subjective criteria, to be used in the RIF.[55] Finally, these decisions recognize the company's right to apply those criteria and typically give short shrift to plaintiffs' claims that they deserved a higher rating[56] or that they, rather than another employee, should have been retained.[57]

In addition to the support that these cases offer in the event of litigation, they also—most importantly, for the purposes of this article—offer a menu of options for employers that are facing RIFs to consider. This menu can be followed through the four steps described below.

Step One: Picking the Model

The first step is to choose among the seven models described above. In thinking about which model makes the most sense for the company, there are a number of considerations to keep in mind.

An important first consideration in deciding which model to use is the level of skill and discretion required in the job being ranked. From the examples above, it appears that multiple-factor matrices are most often used in connection with jobs that are fairly high skilled. Conversely, when the jobs are less skilled, other models are more likely to be used. When evaluating persons such as tool and cutter grinders, for example, Gulfstream Aerospace used a skills-only model consisting of a list of skills and equipment. Similarly, when RIFing hourly employees, Entergy used a written test.

A second consideration is the degree of sophistication possessed by the company's human resources department and/or the outside resources at its command. A sophisticated human resources department will be comfortable with a multi-factor matrix. Some companies (or their consultants) may even feel a need to take the process further and plot the scores (as Xerox did) on a two-axis grid with a formula for determining which cells on that grid would go first. Other companies may not have the resources to create and apply either of these approaches. For such companies, depending on other considerations, a simpler approach, such as the performance-only model, a totem approach or a least-impact approach, may be more appropriate.

A third consideration is the degree of contact and knowledge that the evaluator has with respect to the employees being evaluated. The totem approach might make sense, for example, when the evaluator is directly aware of the strengths and weakness of the employees under his or her command. It would not work, however, under other circumstances.

A fourth consideration is whether there is a factor (or factors) which is so important to the company that it should automatically bar an employee from further consideration for employment. If so, the company may want to consider the multi-level approach. This model prevents an employee who might otherwise have high enough numbers in other categories from surviving the RIF. This should be carefully thought through, however, for at least two reasons: (1) this same result can be achieved by weighting criteria differently (which is discussed in step four below); and (2) the multi-level approach might give a creative plaintiff's attorney multiple opportunities to find a disparate impact.

Once the employer decides which model to use, it can proceed to the next steps of selecting, defining, and weighting the various criteria to be used in its approach. Those items are discussed in that order below, in three separate steps. As a practical matter, of course, these might not be three separate events in time but, rather, all part of the same process.

Step Two: Choosing Which Criteria To Use

Once a company decides which model to use, the second step is to think about the individual criteria to use within that model. There are both broad and specific considerations which a company should consider at this stage.

First, there is no magic number of criteria to use. As the examples illustrate, the typical number of criteria is in the four-to-seven range. There is no specific limit, however, and the examples include companies that have used as many as nine (Aetna), ten (New York City Transit), and even 14 criteria (PPG).

Second, the options include both objective and subjective criteria. Criteria that fall in the more objective realm include criteria such as past performance ratings, past merit bonuses, and seniority. A mix of objective and subjective criteria, however, is more typical.

Beyond these broad issues, of course, the company needs to think about the specific criteria it wants to include and exclude. The cases set forth above, and the criteria set out in those descriptions, offer a valuable menu of options. From those examples, it appears that there are six categories of criteria that employers often use. A brief discussion of those criteria, and the different ways that they are titled and approached, follows.

Performance

In examining specific criteria used by employers, it is typical for employers to use performance criteria. The reason for this is obvious: the company is trying to keep the best people.

Companies take many different approaches to performance criteria. Some call it "performance history" (NationsBank) or "demonstrated performance" (Unisys). Some companies (such as McDonnell Douglas' A-12 Group) include, but distinguish between, past performance and present performance. Other companies use criteria which positively correlate with performance, such as merit pay increases (McDonnell Douglas—A-12 Program), receipt/non-receipt of merit bonus award (Illinois Bell), and merit bonuses and sales bonus numbers based on sales productivity (Wyeth).

Skills

Another typical criteria (or set of criteria) relates to skills—does the employee possess the critical skills that are needed to do the post-RIF job? Some employers use the phrase "critical skills" (Alliant) or "possession of critical skills" (LMES). Others use words that mean the same thing: "technical skills" (Bell Atlantic), "value/job knowledge" (Johnson Controls), "technical capability" (McDonnell Douglas-Business Operations), or "ability to satisfy the requirements of the new position" (Nations Bank).

This is not the only way to look at critical skills. Instead of looking at whether an employee has certain critical skills, for example, the criterion may look at the skills the employee has (whatever they are) and evaluate whether these skills are needed. "Criticality of skill" (General Electric), for example, looks at the skills the employee has and considers their importance to the work to be performed post-RIF. "Relative ability" (Hercules), "skills mix" (Unisys), and "work skills" (Xerox) appear to take a similar approach.

Another approach to skills criteria, of course, is to articulate specific skills that are needed. The use of computer skills (New York City Transit and Puerto Rico Sun) as a separate criteria is a good example. The examples in the skills only model category described above (particularly the Aetna Casualty and PPG programs) contain good examples of the specificity which can be achieved with respect to specific skills.

Education and/or Training

This is another fairly typical RIF criterion. In some programs (such as LMES's), it is clear that the company is focusing on level of formal education. In other cases, it is apparent from the title—such as "education and training" (McDonnell Douglas—A-12 Program)—that all aspects of education and/or training are intended to be included. The criterion may also be described as "education applicable to the job" (Hercules). Finally, some companies (such as Illinois Bell and Puerto Rico Sun Oil) make formal education and specialized training into two separate criteria.

Flexibility

Many companies also utilize some component which takes the employee's flexibility into account. Some companies, such as GE, call this criteria "flexibility of knowledge and skills." Other companies have used other names, like "cross-functionality" (Alliant), "transferability of job skills" (LMES), and "versatility" (Quaker).

Team Skills

Another popular criterion relates to the employee's team skills. This is expressed in various ways: "team contribution" (EG&G), "team building" (McDonnell Douglas—Business Organizations), "personal strength and teamwork" (Xerox-NAMs), and "team skills"

(GE Astro Space). In every case, however, the point is the same: companies find it important to keep employees who have the ability to work well in a team environment.

Seniority

Companies take significantly different approaches to the inclusion of seniority as a factor. Some companies, such as Quaker, have explicitly instructed managers not to consider it. Other companies simply chose not to include it. Indeed, based on the reported cases,[58] including seniority as a criterion does not occur as often as one might suspect. Among the various examples described in the text above, only about one-third included seniority as one of their criteria.

Among those companies who do use seniority as a criteria, it is often labeled as such. A few employers (such as LMES and Lanier) even have a way of counting seniority twice by using both overall seniority and time in position as two separate categories.

As described below in Step Four, the variety of approaches to seniority often revolve around the weight it is to be given. Some of these companies who use seniority as a criterion weight it in such a way that it does not overly influence the outcome of the RIF selection process.

Step Three: Defining the Criteria

Once the company has decided which criteria it will use, the next (and third) step is to flesh out the way that the criteria is used and defined.

As just one example, there are many ways to look at the time period to be considered with respect to job performance. Most companies are specific about the relevant time period. Looking at reviews over the prior three years (LMES and Xerox) seems to be the maximum. Other companies (Unisys and Wyeth) allow consideration of only the last two annual reviews. One company defines a range of time, such as the preceding 12 to 24 months (GE Aerospace), to be focused on. Finally, some companies (Illinois Bell and Exxon Coal) will allow consideration of only the last year's performance appraisal.

Performance, of course, is not the only criterion which needs to be defined. The case studies above offer some good examples of these efforts. Alliant, for example, included useful definitions of various levels of "cross-functionality," GE offered a definition of "flexibility," and LMES offered specific definitions for both "critical skills" and "transferability of job skills."

In defining criteria, a company typically must also begin to think about the levels of ratings with those criteria and the points to be assigned at each of those levels. While this may be done at the evaluator's discretion, the company will typically benefit from defining various levels for the evaluator.

Several companies appear to have recognized that clear direction needs to be given on certain types of criteria or discrepancies could easily arise. With respect to formal education, for example, it is both appropriate and prudent to define exactly what a high school, college, or other degree is worth (LMES and New York City Transit). The same is true with respect to seniority. There, the typical approach is to create a scale where greater seniority translates into more points. This might be one point per year of service (Johnson Controls), one point for every three years of service (LMES), or a progression where the employee gets one point for 2 to 10 years, two points for 10 to 20 years, and three points for 20 or more years (GE).

Assigning points should also be done with care when a criterion relies on a prior performance appraisal. This is not that complicated when just the prior year is being considered—particular ratings may be given certain point values (Wyeth). When a longer period is involved, however, an employer may want to prepare a point chart to assess all the different possible permutations (LMES).

Step Four: Weighting the Criteria

The fourth step is to determine the weight to be given to each of the criteria. Most companies appear to assign equal weight to all of the criteria. This does not have to be the case, however. At this stage, the company needs to be aware of the significance of criteria weighting, the different ways that this weighting may be accomplished, and the degree to which companies who have used different weightings have favored one criteria over another.

The significance of this issue should be readily apparent. Where one criteria is weighted at 45 percent and another at only 10 percent (Bell Atlantic), the results can easily differ from the results if the criteria were evenly weighted.

Different weighting of criteria may be accomplished in different ways. This may be accomplished by assigning different percentages to different criteria (Bell Atlantic and New York City Transit). The same effect can be obtained by assigning different weights to criteria—an individual's points on that criteria are multiplied by the weight, subtotaled, and then added together to complete the process (LMES).

Other distinctions can be made by having different points for different criteria. One company placed different values on past performance and present performance—the former was worth only ten points while the latter was worth 26 points (McDonnell Douglas A-12 Program). Another company (New York City Transit) grouped its 12 criteria into three different weight levels.

Any discussion of criterion weighting must include specific attention to seniority. As noted above, not every company includes seniority as a criteria. For those employers that do, some treat seniority the same as other factors. One (Xerox) treated it more highly than others—giving it one of the two axes from which termination decisions are made. The more typical approach is to underweight seniority to some degree. A company may make it only worth ten points while most other criteria are worth 20, 25, or 35 (Johnson Controls).

The way that seniority, and the point totals available under it, is defined may also serve to underweight it even where its weight is similar to, or more than, other criteria. In the LMES program, for example, seniority was worth the greatest number of points of any category—25. Points under that category, however, were awarded on a scale of one point for each three years of service. Thus, an employee with 20 years of service would only get seven out of ten points before the weight was applied. Other categories—such as critical skills and transferability of job skills—were rated on a more absolute basis even though they had lower weights. Thus, it was possible for strong performers with less seniority to make up whatever ground they needed to on those other categories.

The ultimate under-weighting of seniority or any other factor, of course, is to make it a tiebreaker. Whether the tiebreaker is seniority (Unisys and Gulfstream), or even date of birth (Hercules), it will only come into play in the rare cases where there is a tie.

Among all of the examples above, five companies—Bell Atlantic, Johnson Controls, LMES, New York City Transit, and Illinois Bell—used systems involving differently-weighted criteria. Whether expressed in percentages or weights, most of these companies programs worked off of a total weight of 100. In comparing these five programs, it is clear that the performance and skill categories were the most highly rated—technical skills and job performance combined for 75 percent of the employee score at Bell Atlantic; performance and value/job knowledge made up 60 percent of the score for Johnson Controls; and the last performance appraisal also made up 50 percent of Illinois Bell's approach.

Other Considerations

One important, and overall, consideration should also be noted. It is important in conducting a RIF that it not have an adverse impact on any particular group.[59] One group of particular concern are those employees over the age of 40. These case studies show a variety of means, internal to the company's RIF procedures, of preventing such an outcome from occurring. Some models, for example, use seniority as one of their criteria. To the extent that seniority and age correlate, this should have the effect of helping prevent an adverse impact on the basis of age. There are other approaches. One such approach awarded "protected class" points (Johnson Controls), which presumably included those over 40. Other approaches use factors which directly or indirectly correlate with age as tiebreakers. GE and Unisys, for example, used seniority as a tiebreaker. Hercules was even more direct—it used date of birth as a tiebreaker.

The GE model described above references other ways, in addition to criteria selection, by which a RIF program may avoid an adverse impact based on age. In the GE program, for example, four levels of management had to approve the layoff of any employee with more than 25 years of seniority. GE also sought other placement options for those employees.

CONCLUSION

The task of uncovering RIF criteria in the reported cases is tedious but worthwhile. These reported cases offer a glimpse—not found elsewhere—of how companies are approaching RIFs.

Whether an employer is facing its first RIF or its fifth, the detailed cases studies in the first section of the article, and the four-step process in the second half, should be of assistance and may both stimulate thought and provide confidence with respect to the use of certain criteria. With the assistance of experienced counsel, this article will help employers develop appropriate RIF criteria for their individual situations.

Notes

1. The reports are depressing. Challenger, Gray & Christmas, a Chicago-based

outplacement firm who has been tracking job cuts since 1993, reported that the number of RIFs in July of 2001 was the largest it has *ever* seen in a single month. Moreover, the figures through the first seven months of 2001 significantly exceed the numbers for an entire year since that firm began tracking these statistics. See Daily Labor Report (BNA), p. A-3 (Aug. 7, 2001).

2. For articles regarding the Ford model, the resulting litigation and Ford's change in its program, see Daily Labor Report (BNA), p. A-1 (Feb. 16, 2001), p. A-1 (July 12, 2001), & p. A-2 (Aug. 8, 2001).

3. This article does not include cases where supervisors have just generally been asked to use their discretion in deciding which employees should stay and which should go. See, e.g., *Kulumani v. Blue Cross Blue Shield Assoc.*, 224 F.3d 681 (7th Cir. 2000) (affirming summary judgment for defendant on national origin discrimination claim; managers were instructed to reduce their staff using seniority and performances as benchmarks, but without any mechanical rule).

4. For an example of a RIF case where decisions were made solely on the basis of seniority, see *Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245 (1st Cir. 2000) (affirming dismissal of unlawful termination claim).

5. For cases involving specific RIF criteria which have not been included in this article because of their negative outcomes, see *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159 (10th Cir.), cert. denied, 525 U.S. 1054 (1998) (reversing summary judgment on ADEA claim where plaintiff raised sufficient issue of fact that employer manipulated evaluations to ensure terminations of older employees); *Hogan v. General Electric Co.*, 109 F. Supp. 2d 99 (N.D.N.Y. 2000) (denying summary judgment based on issue of fact relating to exception of "unique" employees from consideration for RIF); *Evans v. Atwood*, 38 F. Supp. 2d 25 (D.D.C. 1999) (motion for summary judgment on ADEA disparate treatment claim denied based inter alia on procedural aspects of RIF program); *Schwed v. General Electric Co.*, 1997 U.S. Dist. LEXIS 5103 (N.D. N.Y. 1997) (granting ADEA plaintiffs' motion for class certification).

6. In granting the employer's motion for summary judgment in *EEOC v. McDonnell Douglas*, 17 F. Supp. 2d 1048, 1051 (E.D. Mo. 1998), for example, the court referenced RIF supervisory guidelines which considered "factors such as experience, versatility of skills, and work quality." In affirming on appeal, however, the Eighth Circuit referred to RIF guidelines which advised decision-makers to consider "factors such as skills and experience, disciplinary record, and length of service." 191 F.3d 948, 952 (8th Cir. 1999).

7. For an example of a case that discusses voluntary early retirement programs, see *Thayne v. New York State Electric & Gas Corp.*, 1997 U.S. Dist. LEXIS 13398 (N.D.N.Y. 1997) (finding for employer on ADEA claim after bench trial).

8. For cases that describe intricate bumping rules, see *Mitchell v. USBI Co.*, 186 F.3d 1352 (11th Cir. 1999) (affirming summary judgment on ADEA claim); *Council 31, American Federation of State, County & Municipal Employees, AFL-CIO v. Doherty*, 169 F.3d 1068 (7th Cir. 1999) (affirming summary judgment on Title VII disparate treatment claims); see also *Myers v. Colgate-Palmolive Co.*, 102 F. Supp. 2d 1208 (D. Kan. 2000) (no bumping allowed); *Zona v. General Electric Co.*, 1996 U.S. Dist. LEXIS 15339 (N.D. N.Y. 1996) (company had policy prohibiting exempt employees from displacing other employees in different departments or work areas).

9. See, e.g., *Messner v. Lockheed Energy Systems*, 126 F. Supp. 2d 502 (E.D. Tenn. 2000) (describing function of RIF Review Board); *Hogan* (cited in note 5) (process called for mid-level management to review initial determination; for the vice president of the function to independently review the records of each employee with 20 or more years of service; and for the legal department to review employees selected for termination); *Montania v. Aetna Casualty & Surety Co.*, 67 Fair Empl. Prac. Cas. (BNA) 885 (N.D. Ill. 1995) (selection materials were sent for review and approval to corporate human resources to ensure the fairness, accuracy, and consistency of the selection process).

10. See, e.g., *Jackson v. E.J. Brach Corp.*, 176 F.3d 971 (7th Cir. 1999) (affirming summary judgment for defendant on ADEA and Title VII claims; safeguards included: (1) supervisors were told that they were not to consider race, color, sex, age, religion, disability, national origin, citizenship, ancestry, sexual orientation, marital status, parental status, veteran status, military discharge, or sources of income; and (2) the company stated that it would attempt to make "special accommodations" for employees with 20 or more years of service, particularly if the employee was 50 or more years of age).

11. For examples of cases that offer some perspective on process but are not specific enough regarding criteria to be included in this article, see *Varga v. Rockwell Int'l Corp.*, 242 F.3d 693 (6th Cir. 2001) (affirming judgment for defendant on ADEA claim); *Doerhoff v. McDonnell Douglas Corp.*, 171 F.3d 1177 (8th Cir. 1999) (same); *Walton v. McDonnell Douglas Corp.*, 167 F.3d 423 (8th Cir. 1999) (same); *Marano v. Aircraft Braking Sys., Inc.*, 138 F. Supp. 2d 940 (N.D. Ohio 2001) (granting motion for summary judgment on ADEA and other state claims); *Scott v. IBM Corp.*, 196 F.R.D. 233 (D. N.J. 2000) (granting in part and denying in part motion for summary judgment on Title VII, ADEA, and ADA claims); *England v. United Ins. Co. of Am.*, 97 F. Supp. 2d 1090 (M.D. Ala. 2000), aff'd, 247 F.3d 249 (11th Cir. 2001) (granting motion for summary judgment on Title VII sex discrimination claim); *Branstetter v. GTE North, Inc.*, 1995 U.S. Dist. LEXIS 12694 (N.D. Ind. 1995) (granting motion for summary judgment on ADEA claim).

12. See also *Osborne v. Brandeis Machinery and Supply Corp.*, 1994 U.S. App. LEXIS 15021 (6th Cir. 1994) (unpublished) (affirming summary judgment on ADEA claim; sole criteria used were versatility and past performance).

13. *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948 (8th Cir. 2001).

14. *Silvestre v. Bell Atlantic Corp.*, 973 F. Supp. 475 (D. N. J. 1997), aff'd mem., 156 F.3d 1225 (3d Cir. 1998).

15. *Brown v. EG & G Mound Applied Technologies, Inc.*, 117 F. Supp. 2d 671 (S.D. Ohio 2000).

16. *Zona* (cited in note 8).

17. *Lenhart v. General Electric Co.*, 140 F. Supp. 2d 582 (W.D.N.C. 2001).

18. *Brodsky v. Hercules, Inc.*, 966 F. Supp. 1337 (D. Del. 1997).

19. *Valle v. Johnson Controls World Servs., Inc.*, 957 F. Supp. 1404 (S. D. Miss. 1996).

20. *Copeland v. Lockheed Martin Corp.*, 1999 U.S. Dist. LEXIS 1904 (E.D. Tenn. 1999), aff'd, 2000 U.S. App. LEXIS 15754 (6th Cir. 2000); see also *Messner* (cited in note 9) (granting defendant's motion for summary judgment in ADEA case brought by RIFed employee in LMES's central engineering services organization).

21. *Brown v. McDonnell Douglas Corp.*, 113 F.3d 139 (8th Cir. 1997).

22. *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 (8th Cir. 1995).

23. *Malewski v. Nations Bank of Florida,* 978 F. Supp. 1095 (S. D. Fla. 1997).

24. *Duncan v. New York City Transit Auth.*, 127 F. Supp. 2d 354 (E.D.N.Y. 2001).

25. *Thayne* (cited in note 7).

26. *Cruz-Ramos v. Puerto Rico Sun Oil Co.,* 202 F.3d 381 (1st Cir. 2000).

27. *Jones v. Unisys Corp.*, 54 F.3d 624 (10th Cir. 1995) (affirming summary judgment in breach of contract and ADEA action); *McNamara v. Unisys Corp.*, 1995 U. S. Dist. LEXIS 5622 (E.D. Mich. 1995) (granting summary judgment in age discrimination and wrongful death action).

28. *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999); see also *Diehl v. Xerox Corp.*, 933 F. Supp. 1157 (W. D. N. Y. 1996) (granting summary judgment under Xerox RIF procedure that used different criteria but similar score/seniority axis placement).

29. *Canady v. Xerox Corp.*, 1997 U. S. Dist. LEXIS 6935 (W.D. Mich. 1997).

30. *Rummery v. Illinois Bell Telephone Co.*, 250 F.3d 553 (7th Cir. 2001).

31. *Berglund v. Royal Indemnity Co.,* 1997 U. S. Dist. LEXIS 12344 (W. D. N.C. 1997).

32. *Nabat v. Aetna Casualty*, 64 Fair Empl. Prac. Cas. (BNA) 1774 (N. D. Ill. 1993), aff'd mem., 45 F.3d 432 (7th Cir. 1995).

33. *Martin v. General Electric Co.*, 891 F. Supp. 1052 (E. D. Pa. 1995).

34. *Ward v. Gulfstream Aerospace Corp.*, 894 F. Supp. 1573 (S. D. Ga. 1995).

35. *Robinson v. PPG Indus., Inc.* 23 F.3d 1159 (7th Cir. 1994).

36. *Coleman v. Prudential Relocation*, 975 F. Supp. 234 (W.D.N.Y. 1997).

37. This insight appears in a different case, *Kennedy v. Quaker Oats*, 1998 U.S. Dist. LEXIS 15340 (E.D. Mich. 1998), which involved the same RIF. Quaker also prevailed on its motion for summary judgment in the *Kennedy* case.

38. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000), cert. denied, 121 S. Ct. 2592 (2001).

39. See *Kennedy* (cited in note 37).

40. *Montania* (cited in note 9).

41. *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913 (7th Cir. 2000).

42. *Lupo v. Wyeth-Ayerst Laboratories*, 4 F. Supp. 2d 628 (E. D. Tex. 1997).

43. The mine engineer also ranked the foremen on one of the seams on the basis of their most recent individual scores on the company's Performance Management System, which was a numerical measurement of a foreman's performance against certain goals in various areas, such as production and safety. It is unclear why this was done.

44. *McGough v. Bethenergy Mines, Inc.*, 837 F. Supp. 708 (W. D. Pa. 1993), aff'd mem., 30 F.3d 1487 (3d Cir. 1994).

45. *Sirvidas v. Commonwealth Edison Co.*, 60 F.3d 375 (7th Cir. 1995).

46. *Leidig v. Honeywell, Inc.*, 850 F. Supp. 796 (D. Minn. 1994).

47. *Peterson v. Lanier Worldwide, Inc.*, 1996 U.S. App. LEXIS 20218 (4th Cir. 1996) (unpublished).

48. See also *Taylor v. QHG of Sprindale, Inc.*, 218 F.3d 898 (8th Cir. 2000) (affirming summary judgment on ADEA claim; department heads told to eliminate jobs that would not directly affect patient care).

49. *Marullo v. Ellerbe Becket, Inc.*, 2001 WL 282772 (E.D.N.Y. 2001).

50. *Meng v. Ipanema Shoe Corp.*, 73 F. Supp. 2d 392 (S.D.N.Y. 1999).

51. *Doan v. Seagate Technology, Inc.*, 82 F.3d 974 (10th Cir. 1996), cert. denied, 519 U.S. 1056 (1997); *Furr v. Seagate Technology, Inc.*, 82 F.3d 980 (10th Cir. 1996), cert. denied, 519 U.S. 1056 (1997).

52. *Allen v. Entergy Corp.*, 181 F.3d 902 (8th Cir. 1999), cert. denied, 528 U.S. 1068 (1999).

53. *O'Sullivan v. New York Times*, 37 F. Supp. 2d 307 (S.D.N.Y. 1999).

54. *Evers* (cited in note 13).

55. See *Hutson* (cited in note 22); *Montania* (cited in note 9); *Nabat* (cited in note 32).

56. See *Evers* (cited in note 13); *Hutson* (cited in note 22); *Montania* (cited in note 9); *Lupo* (cited in note 42).

57. See *Brown* (cited in note 15); *Meng* (cited in note 50); *Lupo* (cited in note 42).

58. It should be noted that the examples include only cases where the RIF procedure has led to litigation. Thus, the one-third figure may be misleading, particularly if those policies which include seniority as a factor are less inclined to inspire litigation.

59. This may be of greatest concern if the company is considering using one of the more unusual criteria—such as "culture change" (Bell Atlantic), "potential" (Illinois Bell), or "learning agility" (Quaker)—set forth in the examples.