

## Firms Need to Be Careful When Considering Layoffs

### Objective, Justifiable Criteria for Cuts Necessary

If you're like other employers, you feel pressure to cut costs even when your company is growing along with the economy as a whole. But if you see layoffs as an option in responding to that pressure, be careful because a single misstep can subject you to potentially ruinous claims from departing employees.

The myth among many employers is that no one will second-guess a layoff. Recent six and seven figure jury awards in layoff cases demonstrate that a layoff is not a risk-free way to get rid of unwanted employees; indeed, it can prove to be just as hazardous to lay off employees as it is to fire them, particularly if the layoff falls disproportionately on minority groups or others protected under federal and state anti-discrimination laws.

Here are three big Don'ts about layoffs:

- Don't try to hide a problem termination behind a layoff. If you need to fire an unsatisfactory employee, fire the individual; don't try to avoid the problem with a layoff.

- Don't use a layoff as a means of getting rid of whistleblowers or what California law calls "public policy" complainers. California and federal laws protect these people from retaliatory actions by their employers.

- Don't allow your layoff to fall disproportionately on particular groups protected by federal and state anti-discrimination laws – for example, people over 40 or those of a certain ethnicity, race, or religion.

The rationale behind these cautions is simple. Every employee you lay off will ask, "Why me?" and if you can't defend what you do in your selection process at every step of the way, you merely arm your employees with reasons to take you to court.

The process begins with developing a clear, written statement of the need for the layoff and the business goal it will make possible. The need must be objective – for example, economic necessity, loss or downturn of business, or changes in production equipment or technology necessitating less manual labor. Notably, a company need not be losing money to justify a layoff. A reorganization which will more efficiently and profitably get the work done is ample justification for a layoff. It is equally important to justify the layoff as a reasonable means of attaining your goal. Would a hiring freeze work just as well? How about voluntary



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that the cut reflects the rationale for your reduction in force in the first place. Put another way, if you intend to outsource your IT work, you can justify eliminating the people now handling this task and, in addition, reduce your support staff elsewhere insofar as it serves IT. In addition, if you intend to allow employees to "bump" from one department to another, you must set out specific criteria by which they may do so.

Next you must set out the criteria by which you will select the individuals to be laid off by name. Here again, you must follow objective, justifiable criteria in case you end up in court.

You may use seniority as a determining factor; it is the most common standard followed during a layoff, and the most easily defended. You may also consider performance, but make sure you have meticulous, written records to justify your choice. Put another way, if you have used informal, verbal performance reviews in the past, they won't do you any good in choosing whom to layoff now, and if you institute performance reviews now specifically for the purposes of a reduction in force, they will probably do you harm, for obvious reasons.

Assuming that you have used written performance reviews in the past and choose now to base your layoffs on performance, make sure that the criteria you have used all along to judge performance are objective, specific, measurable, and clearly documented in your records –

attrition through an early retirement plan or other incentive?

The next step is to identify the employees to be laid off by classification, not name. Whether you intend to eliminate an entire department – for example, one handling work that you want to outsource – or perhaps a certain level of your management team, make sure

for example, consistent failure to meet stated production goals.

The next steps are to:

- Rank your employees in accordance with your criteria, identifying those at the bottom of your list as the individuals to be laid off.

- Analyze the impact of the layoffs to make sure they do not violate federal and state anti-discrimination laws, along with laws protecting whistleblowers and employees who lodge "public policy" complaints with government agencies against their employers.

- Determine whether your layoffs will trigger employee protection for 60 days advance notice under the federal Worker Adjustment and Retraining Act (WARN) and a comparable, more stringent California law requiring advance notice to employees whenever a company closes a plant or reduces its workforce by a certain number.

- Determine what rights your employees have to severance or vacation pay, pension benefits, workers' compensation, retraining benefits, and the like.

- Consider whether providing out-placement services is appropriate.

- Consider whether you want to tether severance payments to the employee's signing a separation agreement releasing the employer from any legal claims.

All of this must come before you actually lay anybody off, and in some ways, your job has only begun when you start that process. It is crucial to communicate clearly with all of your employees, including those who will remain on the job, and guide your managers as to what they can and cannot say and do about the layoffs.

Layoffs are never easy, and most employers consider the idea as a last resort. But when they become necessary, it is important to understand ahead of time that confusion and anger often boil to the surface during a layoff, and the more intelligently you handle the process, the better your chances of avoiding the threat of litigation later on.

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