

Layoffs Ahead? Be Smart. Be Strategic. Do it Right.

Unfortunately in economic times like these, many companies are contemplating layoffs or staff reductions. Layoffs are not easy, as terminating employees is never a pleasant task. That said—a layoff can be much more unpleasant if it fails to navigate the maze of legal requirements that can expose the company to disputes, investigations, litigation and damages.

Is there a layoff in your future?

If yes - **stop and think** – before you act. Whether you are contemplating a layoff of 5, 50, or 500 employees – you need to plan properly. Smart companies think strategically and analyze their legal obligations, so that a layoff does not spawn a rash of lawsuits.

Here are some “tips”—an outline of items you should think about, before you undertake a layoff:

PLANNING

1. Document the reasons for the layoff. If a layoff is challenged, a court may require you to establish that there was a “legitimate business need” for it. That may be hard to do months or years after the layoff is over.

Think about this as you begin to plan, document the company’s problems including financial losses, lost business and operating expenses. The more thoroughly a company documents its needs, the easier it will be to demonstrate a “legitimate business need” for the layoff if challenged.

2. Consider alternatives to a layoff. Before you fire anyone, consider other options such as hiring freezes, wage freezes, dividend cuts, voluntary early

retirement or voluntary separations. Convincing employees to leave voluntarily is often preferable to involuntary terminations, and can reduce the risks of legal liability. Early retirement plans – accompanied by a release of claims – are generally lawful. Before designing such a package, be sure to consult counsel and do it right.

3. Select employees carefully. Selecting whom you target for layoff is the trickiest part of the process. Those selections must be based on a legitimate business need and should fit within the company’s documented goals. Consider:

- What business goals did the company need to achieve with the layoff, and what kind of a staff reduction would achieve those goals?
- Will the company lay off all employees in one position, all employees in a division or department; or will you select specific employees within different areas? In other words—are you closing an entire area or doing “selective-strikes”?
- Either way, your selection criteria must be clearly defined and objective as possible. Document skills or jobs that the company needs to retain for the future. Why are certain functions considered “critical”? If the company is looking at performance, how are employees being rated? The criteria must be reasonable and related to business objectives, and must stand up later under scrutiny.
- If performance or job functions are to be considered, the layoff plan should spell out exactly how this will occur. If performance is the criteria, will the termination decisions be based on past evaluations or will new evaluations be prepared for the layoff?

4. Review Contractual Obligations. Review the company’s contractual obligations. Are there any employees in the target unit who have employment agreements? Are there terms or severance provided for in those agreements?

Are there unions? If so, the collective bargaining agreements must be followed and unions must be notified. Review with labor counsel the process for communicating with the unions and your obligations under the CBA.

5. Train Your Decision-Makers. Individuals who make the layoff decisions must follow the layoff plan and adhere to the company’s selection criteria. The employer must train the decision-makers not to consider or discuss age, sex, race, or any other protected category, and to apply the selection criteria based on neutral factors, such as skills, functions and responsibilities. Lastly, be sure they document the basis for their decisions properly and consistently.

6. Review/Analyze the “Layoff List.” As the final step – you should have one person or committee, who were outside the decision-making process, conduct a critical review of all the layoff decisions before the layoffs occur. The reviewers should look to see if there was any “disparate impact” on any protected class or potential discrimination against an employee.

What is disparate impact? Very briefly, if it looks like there are a disproportionate number of employees in one or more protected groups (race, gender, age, etc.) on the layoff list – take another look at the list. Employees (or an attorney) for one of those protected classes may potentially challenge the layoff, because it fell “harder” on that group. You may need to do a “disparate impact” review. Employers should consult counsel and in a large layoff, use statistical experts to conduct this analysis.

How do you spot potential “discrimination claims”? *Use common sense.* Is there an employee who is long service, or in a protected category (or both) on the layoff list? Ask why this person? Was someone sin-

gled out? Make sure there are legitimate, objective reasons for everyone who appears on the list, but particularly those who are in protected groups.

7. Severance Packages and OWBPA Compliance.

Consider offering some type of a severance package to employees who are laid off, in exchange for a release. If the company can afford it, these packages and releases are lawful and will protect you from lawsuit later – if drafted properly. For employees over the age of 40, employers need to comply with the Older Worker’s Benefit Protection Act (OWBPA). This statute requires that any written agreements containing a waiver that is offered to employees over 40 complies with the following general guidelines:

- The waiver must be written in clear language;
- The waiver should specifically state that the employee is waiving ADEA claims;
- The employee must be given consideration;
- The employee must be specifically advised to consult an attorney;
- The waiver must state that the employee cannot waive claims that may arise after the date of the waiver being signed;
- In a layoff, the employee must be given at least 45 days to consider the waiver; and
- The employee has seven days to revoke the waiver after signing it.

In the context of a group layoff, the employee must also be provided with an appendix that lists a number of things, including the job titles and ages of those employees who were or were not “eligible” for the severance program. Legal counsel should be consulted in preparing these documents, since absence of even one of the OWBPA requirements invalidates a waiver.

8. Review WARN and Local Labor Laws. The federal Worker Adjustment Retraining Notification

Act (the WARN Act), requires employers with more than 100 employees to provide 60 days advance notice in the event of a “plant closing” or “mass layoff,” as the terms are defined in the WARN Act. The WARN Act specifies when these obligations are triggered and to whom the notification must go.

Employers that violate WARN may have to pay back pay and benefits to each employee, as well as a \$500 daily fine. Legal counsel should be consulted to determine whether a RIF has triggered a WARN obligation.

- 9. Local Labor Laws.** Check state and local laws relating to terminations. For example, some states have their own “WARN” Acts. (New York has a WARN Act going into effect in February 2009). There may also be state laws regulating the manner in which employees are notified of terminations and the payment of wages. All such state laws require compliance.
- 10. Don’t forget COBRA.** Under the Consolidated Omnibus Budget Reconciliation Act (COBRA), employers with more than 20 employees are required to offer terminated employees the option of continued group health coverage. Legal counsel should be consulted as to specifics of COBRA rights, notification and other requirements.

“PARTING THOUGHTS”

Documentation and Implementation

Proper Documentation. Properly documenting the layoff plan, the selection criteria and the reasons for selecting the individual employees will arm the company with necessary defenses should an aggrieved former employee decide to bring a lawsuit. The best way to convince a judge or jury that the termination was not

based on discrimination is to have a paper trail with the employer’s legitimate business reasons for its decisions.

Implementation. Plan the layoff announcement carefully. How will employees be told of the RIF?

Train the managers or HR representative who deliver the news, arm them with talking points so statements are consistent throughout the company. Be honest with employees—tell them the truth about why they were chosen or why the company is doing the layoff.

Most importantly, treat employees with consideration, dignity and respect as they walk out the door. Employees who are treated well as they leave will be less likely to sue the company later. Keep that in mind in those final days.

CONCLUSION

This is just a snapshot and does not cover all of the issues and considerations which arise as you plan a lay-off. We recognize that these steps are not simple, and some take time and money. Yet, they are worth it. A lay-off is a difficult step, usually undertaken to save the company money. However, if the layoff results in a lawsuit, with a six-figure damage award or costs you thousands in attorneys fees after the fact, it may have all been for naught.

This does not need to happen. Be smart; be strategic and do it right. Careful planning and implementation today can prevent lawsuits and liability tomorrow.

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