



HR & Staffing Guide

Layoffs and Terminations in These Troubled Times

By Nicole Kamm and Sue M. Bendavid

According to recent polls, 48% of organizations laid-off employees in 2008, and 60% expect to lay off employees this year. Already, the first two months of 2009 saw nearly 300,000 layoffs.

A consequence of these difficult economic times is increased risk of potential liability. Layoffs and terminations can lead to lawsuits, even if discrimination or other employer action isn't intentional. This article provides employees information and tools to try to protect themselves when making crucial decisions concerning layoffs, downsizing and reductions in force.

Selecting Employees for Layoff

The risks of wrongful termination, discrimination and other claims can be minimized by ensuring employees are treated fairly and equally in the separation process. The following steps may be used when selecting employees for layoff:

- Identify criteria by which employees will be selected (e.g., nature of work, length of service, category (part-time employees), job performance, discipline). In doing this, consider the essential skills the company will need for the immediate future.
- Analyze comparative performance and skills. If you are going to select employees based on performance, base decisions on performance reviews and other documented business-related factors.
- Review for possible disparate impact. If a prospective layoff impacts one group more than others, ask whether selection can be justified by business necessity or other reasonable factors. If not, consider alternative selections of employees who are outside the protected class.
- Document how and why selections were made.

Consider WARN and/or Contract Obligations

Employers who have employed at least 75 people in the last 12 months must comply with the state and federal Worker Adjustment and Retraining Notification Acts (WARN). Both of these laws require 60 days advance notice if there will be a loss of employment for

50 or more employees in the same location.

The potential damages for violations are substantial. Employers should attempt to comply with every aspect of the WARN laws. Since the WARN laws are complicated, consulting legal counsel in this situation is advised.

Employers should also be aware of possible termination limitations, liabilities and/or obligations under collective bargaining agreements or other types of contracts.

Be Honest and Straightforward

Employers should be truthful about why the employee was selected for layoff. If the decision was based on subjective criteria, such as work performance, rather than objective performance, such as seniority, the employer should be prepared to defend its decision.

Exit Interviews

Employers may want to conduct exit interviews of laid off or terminated employees. Employers should document responses and ask the employee to review, sign and date. This will serve as "evidence" of the basis for the employee's discharge and make it more difficult for the employee to deviate later by providing a different version of events.

Separation Obligations

A layoff or termination will trigger California's strict time requirements governing payment of final wages on separation of employment. When an employee is terminated, all earned and unpaid wages must be delivered to the employee at the time and place of termination. "Wages" include bonuses, earned commissions, business reimbursements and accrued, unused vacation. Under the Labor Code, failure to timely pay all wages due may result in waiting time penalties, up to an additional 30 days wages.

Additionally, various notices must be provided to employees on discharge.

- The state and federal Consolidated Omnibus Budget Reconciliation Acts (COBRA) require employers to notify employees of their COBRA rights at the time of a "qualifying event," such as termination or layoff.

- A Department of Health Care Services Health Insurance Premium Program (HIP) notice alerting employees to the availability of continued medical, surgical or hospital benefits is required under the Labor Code.

- Employers must provide employees a DE 2320 pamphlet published by the California Employment Development Department, summarizing the employee's rights to unemployment benefits.

- Under the Unemployment Insurance Code, employers are required to provide employees written notice of the change in their employment status. The notice must include the name of the employer, the name of the employee, the social security number of the employee, whether the separation is due to termination or layoff, and the date of separation.

Separation Agreements

Employers may choose to provide separation pay to employees in exchange for a written release of claims. Such agreements are particularly helpful where the employer is concerned the termination or layoff may result in litigation. However, strict compliance with legal requirements is crucial to the effectiveness of any release.

There are, as is often the case in the law, several limitations to a separation agreement. First, some rights are not waivable. For example, a release cannot include waivers of unpaid wages. However, employees and employers do have the right to settle disputed wage claims. Therefore, an acknowledgment that the employee received all wages due should be included.

If a separation agreement involves an employee who is 40 years old or older, the release must comply with the Federal Older Workers' Benefit Protection Act (OWBPA). The OWBPA requires, at a minimum: specific reference to rights and claims arising under the Age Discrimination in Employment Act (ADEA) in the release itself; the employee has 21 days to consider the release; the release must advise the employee of his or her right to consult an attorney prior to executing the agreement; and the employee has up to 7 days to

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revoke the release after execution.

If an employer offers severance in exchange for a release of an age discrimination claim to two or more employees, and any of the employees is 40 years old or older, the release must comply with additional requirements, including a 45-day review period (rather than 21 days). The release must also list all affected employees, their ages and other information.

Recent FMLA regulations clarify that Department of Labor approval is not required to release FMLA claims. Therefore, employers can include the FMLA in the list of laws covered by the release.

References

Responses to reference requests should be limited. The less employers say, the better. Any information provided can lead to costly litigation by the former employee for defamation or other claims. While defenses

may be available, employers should have a written policy in place, and employees should be reminded on termination, that the company will only provide the employee's date of employment and position in response to reference requests. To control what is said in response to inquiries, all requests should be directed to one particular individual or department (Human Resources).

Conclusion

This article raises several issues facing employers undertaking a workforce reduction or termination. However, its scope is limited. Many other issues may arise. The attorneys of Lewitt Hackman's Employment Law department are available to answer any questions and assist employers through the process.

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