

Downsizing Your Workforce

Choose your euphemism: “downsizing”, “rightsizing”, “reduction in force” (RIF).

A layoff is never a happy event – do not expect it to be. Recognize that emotions will run high, including your own. Still, a layoff can be undertaken in a way which causes the least possible disruption and which employees know in their hearts is fair.

This article will address some of the issues involved in planning for a layoff at a non-union employer (layoffs for a unionized employer will be controlled by the collective bargaining agreement). What is stated is very brief to assist in identifying the kinds of issues you need to address. Although it still will not be pleasant, if you take the time to work through these issues, a layoff can go smoothly with the least turmoil.

ALTERNATIVE TO A LAYOFF

Before deciding that a layoff is necessary, consider whether or not there are any alternatives to a layoff which could work in your operation.

Reducing the size of the workforce through attrition or a hiring freeze are possible alternatives. Typically, however, they would take a rather long time to achieve the smaller workforce desired. They may not achieve results fast enough for your situation.

Another alternative is to offer employees incentives for early retirement. If you consider this approach, it must be carefully planned to avoid legal problems under age discrimination laws. You should consult with your attorney in this regard.

When the need to reduce payroll is only a temporary condition, some health care employers consider implementing a “low census policy” rather than a more permanent layoff. The term “low census policy” is taken from the hospital environment. It generally refers to a policy of encouraging employees to take paid or unpaid time off in lieu of the employer implementing layoffs.

An employer usually pursues a low census policy because it believes it is more fair for all employees to suffer a little rather than to have a few employees lose all of their regular income under a more traditional layoff. Whether or not this belief is correct is questionable. A low census policy can result in more employee dissension rather than less. If a number of full time employees each suffer a reduction in his or her hours of work rather than one employee being totally laid off, after a time, the employer will probably have many unhappy full time employees rather than simply one person who is no longer in the workplace.

If you do consider a low census or similar policy for your operation, recognize that a reduction in the hours or days an employee works can affect the employee's eligibility to participate in various employee benefits. Do not say all benefits will continue for the employees affected unless you are certain each benefit, in fact, will continue under the terms of your benefit programs.

WORKER ADJUSTMENT AND RETRAINING ACT (WARN)

The federal Worker Adjustment and Retraining Act (WARN), 29 U.S.C. § 2101 et seq., applies to employers who have 100 or more employees. It does not apply to public employers.

Whether or not an employer has 100 more employees is determined in one of two ways. An employer is covered if it has 100 or more employees (excluding part time employees) or if it has 100 employees (including part time employees) whose total weekly work hours (excluding overtime) is at least 4,000 per week. A part time employee is one who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than six of the 12 months preceding the date on which the notice is required.

WARN requires covered employers to provide notification 60 calendar days in advance of closings of operations and mass layoffs. Notice also can be required to be given to governmental units so they can prepare to assist workers without jobs.

A covered closing of operations occurs when a facility or operating unit is shut down for more than six months, or when 50 or more employees lose their jobs during any 30 day period at a single site of employment. A covered mass layoff occurs when a layoff of six months or longer affects 500 or more workers, or 33% or more of the employer's workforce when the layoff affects between 50 and 499 workers. The number of affected workers is the total number laid off during a 30 day or, in some cases, a 90 day period.

WARN does not apply to the closing of temporary facilities, or the completion of an activity when the workers were hired only for the duration of that activity. Less than 60 days notice may be permissible when the layoffs were the result of the closing of a "faltering company", unforeseeable business circumstances, or a natural disaster.

If a covered employer fails to comply with the WARN requirements, the penalties include liability to each employee for an amount equal to the back pay and benefits for the period of the violation, up to 60 days.

The application of WARN to a layoff can become somewhat complex. If your business has more than 100 employees, you should consult with legal counsel to determine your responsibilities, if any, under the federal law.

THE IMPORTANCE OF A WRITTEN LAYOFF POLICY

Any layoff will proceed much more smoothly if undertaken pursuant to a written layoff policy adopted before the layoff occurs. A written policy not only gives you a chance to

think through the various issues which become involved with the layoff but avoids an employee perception of arbitrary treatment and favoritism.

As you consider a layoff policy for your business, there are a number of issues to address. These include:

Basic Concepts

Initially, you need to determine whether or not you are going to distinguish between temporary and permanent layoffs or between short term and long term layoffs. Or, are you only going to have “permanent” layoffs? The value in distinguishing between temporary and permanent layoffs or short term and long term layoffs is that you may want your procedures to differ if a layoff is going to last less than two weeks, for example, than if it is going to be long term or permanent. You need to decide what is the most workable approach for your operation.

- Who decides if a layoff will occur?
- Who makes the decision concerning whether there will be layoff? Is it made by the president, the executive director, a manager, the administrator, the board of directors?
- If a layoff will occur, what group of employees is affected?
- Is the group affected determined by employment status (e.g., full time, part time, temporary, introductory)? By job title? By agency office? In other words, when you are determining whether a layoff is necessary, what group of employees will you look at?
- Who determines who will be laid off within the affected group?
- Does the same person who determines whether a layoff is necessary also decide who will be laid off? Or, is it someone else? For example, perhaps the President of the company determines whether a layoff is necessary at a particular company office or plant, but, then, the employees’ supervisors determine who will actually be laid off.
- What is the criteria to be applied in determining who will be laid off?
 - This is possibly one of the most important aspects of a layoff policy to avoid employee perception of arbitrary treatment and favoritism. It is not so much what is said as it is that the situation be clearly stated. A basic distinction is whether layoffs will occur by length of service (i.e., “seniority”) or by merit/qualifications. Although employees tend to accept seniority as a determining criteria, legally it is not necessary to select employees for layoff based on seniority.

Most employers want to retain those employees who are the most qualified in the employer’s judgment rather than those who are simply the most senior. If that is the case at your business, what criteria will be used in determining the employees who are most qualified? Examples could be training, demonstrated skill, attendance record, disciplinary record. If you look at employees’ attendance records in determining who will be retained, be sensitive to disability and handicap discrimination prohibitions.

- Consider, too, what you will do if you determine two or more employees are equally qualified or have the same length of service? How will you break the tie?
- What is the effect of layoff?
- If an employee is laid off, does employment terminate? Does the employee have a right of recall in the event positions open within the agency in the future? Typically, non-union employers do not give a right of recall and, instead, simply state that, in the event the employee is laid off, his or her employment terminates.
- If employment does not terminate, what is the situation involving various benefits?
- If employment does not terminate when an employee is laid off, to what extent do various benefits, such as health insurance, continue during the period of layoff? In this regard, you must be sure what you say is consistent with the underlying insurance policies.
- May the employee use accrued vacation during the layoff? If so, is it used in lump sum or is it paid on regular pay days? Paying it out over the period of the layoff, rather than in lump sum, may reduce unemployment compensation obligations.
- Consider all the various questions which could arise under your personnel policies and answer them so there is no misunderstanding of the employees' rights during the layoff. For example, does a laid off employee still receive paid holidays? Does vacation continue to accrue? Is the employee eligible for a leave of absence?
- How much notice of a layoff will be given?
 - Unless your operation is subject to WARN (discussed above) no advanced notice of layoff is legally necessary, unless it is required by state law. Still, most employers will attempt to give a certain amount of notice that an employee is being laid off. Do you want to say anything in that regard? If you do, say you will "attempt" to give that amount of notice rather than obligating your business to do so.
- Are employees entitled to receive any severance pay?
 - Severance pay is not legally required, but some employers do give severance pay in the event an employee is laid off. If so, define how much it is and when it will be paid. As with payoff of vacation, if the severance pay is paid on regular pay days, rather than in lump sum, it may avoid unemployment compensation liability for the period of the payments. Note that, if you promise severance pay, you will probably be required to pay it and it will be treated like other wages.
- Are there any differences between a temporary/short term layoff and a permanent/long term layoff?
- Consider whether or not there are any differences depending upon the type of layoff involved. For example, if a layoff is short term rather than long term, does it make a difference in how employees are selected for layoff? Does it make a difference on benefit continuation? Payment for paid holidays? Once again, consider the issues and answer the questions in your policy.

THE IMPORTANCE OF COMMUNICATION

Throughout the layoff process, it is extremely important that you communicate openly and truthfully with employees concerning why a layoff is necessary and how it will be

undertaken. Even though the news is not good, the known is much less scary than the unknown.

THE IMPORTANCE OF ACTING QUICKLY

Whatever your layoff policy, act quickly. Do not drag out the process of determining whether or not there will be layoffs and, if so, who will be laid off. Try to avoid a few layoffs one week, followed by some more a week or two later, followed by some more a week or two after that. Come to the grips with the size of the workforce you must have and reduce to that size quickly. Do not prolong the agony. Remember, there is nothing you can do that will make the layoff a happy event for either the employees or yourself. Get it over with so you can begin the positive process of surviving and rebuilding in today's environment.

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The content of this article was last reviewed and updated as necessary on 10/28/11.

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