

## **Tips for Employers When Considering Layoffs/Downsizing**

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Companies are facing tough decisions these days. And when those decisions impact people the decisions can seem even tougher. This article outlines approaches to help employers make those decisions and make sure that they avoid legal claims down the road.

- 1) When you determine the need to make reductions it is helpful to document specific reasons for the reductions. Obviously in this economic environment that is a fairly easy task but having specific facts and data to support those reductions can be used later if an employee decides to challenge who was let go. And document the number of employees who will have to be displaced and the grounds for determining those numbers.

As part of that process it is also important to look at alternatives to layoffs – could you reduce hours, could you reduce salaries or benefits, could you cut back on use of overtime or use of temporary staff. Could you just freeze hiring or actually through attrition, downsize your staff. Could you pull staff from one area that perhaps is overstaffed and retrain them to work in another area of the company.

- 2) Know your workforce's profile – that means you have a snap shot of your employees by race, sex, and age. When you look to reduce staff make sure the cuts don't create an unintentional adverse impact. What this means is that the workforce snap shot after the cuts may show that you laid off more older employees, more females or more minorities. If you can show that the workforce mix didn't change, a claimant's case would be weakened. (Adverse impact can be reviewed by our HR consulting staff if you need assistance.)
- 3) Weigh the potential costs of downsizing including attorney's fees, consultant's fees, unemployment claims, severance pay, possible litigation, etc. You will also want to look at the intangible costs if there are productivity issues due to lower morale of the employees who remain – who may be fearful of when the other shoe is going to drop.
- 4) Review whether there are contractual commitments or employee benefit plans that limit the employer's options. Do you have an employment contract or a collective bargaining agreement? Do you have written severance plans or employee handbooks that outline a specific procedure for laying staff off? Are there benefit plans that provide special benefits to terminated employees?

- 5) You may want to consider voluntary RIF's (reduction in force) first. Early retirement incentive plans offer enhanced severance or retirement benefits to a group of employees in exchange for a release against all claims against the employer. If you take this route be sure to get an attorney involved and discuss how the plan might impact ERISA and/or tax laws. You will want to use the attorney to also help you write a release that employees sign in return for additional benefits and agreement not to sue you. This release must be in compliance with the Older Workers Benefit Protection Act.
- 6) When you select the employees for layoffs first try to use objective methods for identifying the employees to be terminated. The safest course may be seniority but this may create adverse impact if more minorities and females are less senior and therefore the employees who are released. Other objective methods might measure quantity of production. In most cases, you need to conduct a thorough analysis of the positions you need and then look at documented performance among staff who may be let go. Are they the poorer performers? Know, however, that even if you do everything right, you may still be subject to liability or discrimination charges. One way to minimize that liability is to have layoff policies and procedures in place prior to a RIF and then implement them consistently.
- 7) If you have over 100 full time employees or more than 100 full-time and part-time employees who work in the aggregate at least 4,000 hours per week (exclusive of overtime) that you may be subject to the WARN Act (Worker Adjustment and Retraining Notification Act). In this case you may be required to give employees 60 days advance notice if you have a "mass layoff" or a "plant closure". (This is a detailed Act so seek assistance when looking at your workforce.)
- 8) Make sure that the employees who communicate the news of the layoff to the individual employees are conscientious, legally knowledgeable and properly trained. This will also help to reduce your liabilities,

There is no easy way to soften the blow when you are having to make tough decisions and informing employees of those decisions. You will want to make sure you have done your homework. It will also be important to let the remaining employees know what has happened and why. While you cannot necessarily ensure that there will not be more terminations down the road, if you do your homework you can ensure the employees that you will take actions that are consistent and administered fairly.

*This information is not a substitute for legal advice.*