

Human Resources 4U



Your One Stop Human Resources Shop!

Layoff Considerations

During these severe economic conditions many employers have to consider reductions in their workforce (RIF). However, when laid-off workers have a difficult time finding a new job, they are more inclined to sue their former employers. Such suits may be more prevalent in the current economic downturn than in better times.

Deciding on a RIF is never easy for employers seeking to cut costs while minimizing their legal risks. If the RIF is not carefully planned in advance, a workforce reduction can result in considerable liability offsetting any initial savings the employer achieves.

Below you will find a brief overview of things to consider prior to conducting a RIF.

WARN act

The first thing to consider is if the Federal or CA Worker Adjustment and Retraining Notification Act (WARN) acts apply to you organization. The main criteria for the Federal act are:

- If you employed 100 or more employees within the last 12 months
- You must give a 60 day notice
- For a plant closing (affects 50 or more employees)
- Or a mass layoff (33% of employees)

The main criteria for the CA act are:

- If you employed 75 or more employees within the last 12 months
- You must give a 60 day notice
- For a plant closing or mass layoff (affects 50 or more employees)

Employers who fail to provide required notices may be liable for back pay and the value of benefits lost during the violation period.

Voluntary Programs

Prior to beginning a formal involuntary RIF you might want to consider the feasibility of voluntary attrition programs – some factors to consider are time constraints, business conditions, make-up of your workforce, and the availability of sufficient incentives for program participation. You may be able to retain discretion to deny resignation requests from mission-critical employees under certain circumstances.

Pension and Benefit Considerations

However, if you decide that you must go ahead with the RIF you will need to determine impact on any pension and benefit plans that you may offer –it may be prudent to avoid selecting employees for layoff shortly before they are scheduled to become vested in substantial employee benefits.

Selection Criteria

Next you need to Prioritize your selection factors – If you are not subject to a collective bargaining agreement, you can use any criteria you want as long as you can show that you are not discriminating against a protected class. From an employer's perspective you would want to base your decisions on performance criteria (keep your good performers and let your poor performers go). Your selection should always be based on quantifiable and objective factors, such as:

- elimination of certain categories of employees, e.g., temporary, part-time, or contract workers
- pre-existing job appraisal data related to successful performance of critical post-reduction functions
- disciplinary actions taken for severe or persistent performance problems.
- elimination of unnecessary job classifications
- length of service or seniority

Disparate Impact Analysis

After you have made your initial layoff decisions you should also review for possible disparate impact prior to implementing layoffs. You will need to see if there will be any disproportionate effect on protected categories, such as, minorities, women, or workers 40 years of age or older. **If so, evaluate whether the selection of these individuals can be justified by business necessity, or in the case of older workers, by reasonable factors other than age.** If not, consider alternative selections of individuals who are outside the protected categories.

A disparate impact analysis is a **statistical calculation** that may yield results that are not necessary apparent or intuitive but that the courts have used as a guideline in determining if a company is disproportionately laying off employees in protected EEO categories.

For example, let's say you had 80 employees, with 15 of them over age 40 and you had to lay off 12 employees. A disparate impact analysis would indicate that if 3 or 4 of those layoffs were over 40, you would be OK. If 5 of the layoffs were over 40 you are in a "maybe OK" area but if 6 or more employees were over age 40 you would probably be in trouble.

Obtaining a Release

A final option to consider would be to offer employees a severance agreement that would function as a general release. This can significantly reduce your legal exposure. There are several requirements for a release to be legal so it would be best if it were drafted or reviewed by an attorney.

Separation Notices

Finally, there are various notices that must be provided to employees upon termination of employment. Employers are required to notify an employee of COBRA rights at the time of a qualifying event, including termination of employment. Similarly, employers must provide every employee with a notice regarding the availability of continued medical, surgical, or hospital benefits through the Department of Health Care Services' Health Insurance Premium Program (HIPP). Employers must also provide to employees a pamphlet published by the California Employment Development Department (DE 2320). The pamphlet summarizes the employee's rights to unemployment benefits. And lastly, employers need to provide to employees written notice regarding changes in their employment status. The notice must include, at a minimum, the name of the employer, the name of the employee, the social security number of the employee, whether the action is a termination or a layoff, and the date of the action.

If you are considering a RIF for your company and would like assistance to make sure you are doing it correctly, Human Resources 4U can help you with the process, as well as, all your other Human Resource needs. For additional information contact Martin Levy: Phone: (909) 912-9995 or by Email: hrexec@humanresource4u.com

Human Resources 4U is a full service Human Resources consulting company specializing in small and midsize businesses.
Note: This article is presented with the understanding that we are not engaged in rendering legal advice. If legal advice is required, the services of a competent attorney should be sought.