

LAYOFFS, DOWNSIZING & RIF'S

How To Do Them Right

by Greg S. Labate

Employers are at great risk of potential liability when making decisions concerning layoffs, downsizing, and reductions in force. This article provides employers with practical information and useful tools to protect themselves from liability when making these crucial choices.

Layoffs

Employers should precisely follow their own policies and procedures when conducting layoffs. Never use an economic layoff as an excuse to terminate a problem employee. Always be truthful about the reasons for a termination.

Exit Incentive Programs

Whenever possible, attempt to utilize an exit incentive program. Such programs should ensure a fair and consistent means of encouraging employees to accept the severance being offered by the employer now, rather than wait for a possible termination without severance later. Before instituting such programs, employers should consider issues concerning employee morale, the need for continued work on existing matters, and proper advanced notification to employees, while still protecting the employers interest. It is a difficult balancing act.

Severance

If you provide employees with any severance, you should always obtain a written release of all claims against the employer in return. Otherwise, employees could use their severance checks as a down payment on a lawsuit against their former employers. Why give away something for nothing? Employers should have a written severance policy that states severance is not guaranteed; severance is at the sole and absolute discretion of the employer; and any severance will be conditioned on the execution of a written release of all claims against the employer.



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Older Workers' Benefit Protection Act

If you provide severance and a release to any employee who is 40 years old or older, the release must comply with the Federal Older Workers' Benefit Protection Act ("OWBPA"). If the release does not comply with the OWBPA, it will be invalid. The employee will be able to keep the money and still sue you. The OWBPA requires: a special reference to the OWBPA in the release itself; the employee has up to 21 days to consider the release; and the employee has up to 7 days to revoke the release after execution. There are additional OWBPA requirements for group layoffs. If you offer severance and a release to two or more employees, and any of the employees are 40 years old or older, the release must also comply with additional special requirements under the OWBPA, including: a 45-day review period, instead of 21 days; and the release must contain a list of all employees in the affected departments, their ages, and whether they were laid off.

WARN Act

The Federal Worker Adjustment and Retraining Notification Act ("WARN") generally requires that a covered employer provide 60 days' notice of a plant closing or mass layoff. It is designed to provide protection to workers, their families, and communities.

An employer is generally covered under the WARN Act if the employer has 100 or more full-time employees. "Full-time employees" are defined as those who are employed for an average of 20 or more hours per week, or who have been employed for at least 6 months prior to the required notice date. Part-time employees, independent contractors, and employees of subsidiaries are not included in this calculation under the WARN Act.

A "plant closing" is a shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, that results in an employment loss during any 30-day period for 50 or more full-time employees. A "mass layoff" occurs when, in the absence of a plant closing, an

employment loss affects 33% of the full-time employees, but not less than 50 employees in total, at a single site of employment, or any loss affecting 500 employees in total over a 30-day period. The definition of "single site" is complicated, and requires a detailed factual and legal analysis.

Normally, the determination of the number of employees impacted is measured over a 30-day period. However, if two or more groups suffer employment losses at a single site of employment within 90 days of each other, and each group is fewer than the minimum required to trigger the WARN Act, the two groups will normally be combined, which will then trigger the WARN Act anyway.

Covered employers must provide at least 60 days' written notice of the plant closing or mass layoff. In the alternative, they may give 60 days' pay in lieu of notice. The notice requirements are very technical and complicated, and require notification to workers, government, and/or unions.

There are exceptions to the notification requirements of the WARN Act:

1. "Faltering company": where a company is actively seeking capital or business which, if obtained, would enable the company to avoid or postpone a shutdown; but only if the employer has a reasonable and good faith belief that giving the required notice would preclude the employer from obtaining the needed capital or business;

2. "Unforeseen business circumstances": where a plant closing or a mass layoff with less than 60 days notice is necessitated by business circumstances that were not reasonably foreseeable at the time that the notice would have been required; i.e., a dramatic and unexpected condition that is outside the employer's control; sudden termination of a major contract by the employer's principal client; a strike at the company's major supplier; an unanticipated and/or dramatic economic downturn; a government ordered closing of an employment site without prior notice; and

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3. “Natural disasters”: which actually cause the plant closing or mass layoff.

The burden is always on the EMPLOYER to prove these exceptions apply. Even where an employer relies upon these exceptions, the employer still must provide as much notice as is practicable.

Special rules apply in the event of a sale of a business. The seller must comply with notice requirements for any plant closing or mass layoff up to and including the effective date of the sale, and the purchaser must comply with notice requirements of any plant closing or mass layoffs that take place after the day of the sale. Agreements should be reached between the seller and the purchaser concerning their respective obligations under the WARN Act as part of the sale of the business.

However, the WARN Act is not triggered by the mere sale of a business if employees continue to work for the purchaser after the sale, since the employees do not experience any “employment loss” even though they are technically terminated by the seller.

Also, employees will not experience an employment loss if a plant closing or mass layoff is a result of the relocation or consolidation as part of the employer’s business, provided that:

1. the employer offers to transfer the employee to a different location that is within a reasonable commuting distance; and

2. the break in employment that the employee will experience will not exceed 6 months.

The penalties for violations of the WARN Act are severe: potential class action lawsuit in federal court; award of back pay, front pay, and lost benefits; civil penalties, up to \$500 for each day of violation; and payment of attorneys’ fees. Since the potential damages for federal violations of the WARN Act are substantial, employers should ensure that they are complying with every aspect of the WARN Act.

There are several means of avoiding liability under the WARN Act, such as providing early notice, conducting structured layoffs, using valid business necessity defenses, etc. Employers should consult with experienced labor counsel concerning this complex federal law.

Exit Interviews

Whenever possible, employers should conduct exit interviews of terminated employees. Employers should fill out exit interview forms and have the employees sign them. This will document the circumstances surrounding the employee’s termination, and

make it difficult for the employee to change his or her story about the termination if they later decide to sue the employer.

Outplacement Services

Employers should consider using professional outplacement services to assist terminated employees in finding alternate employment. Although these outplacement services can be expensive, they are a relatively inexpensive means of preventing or limiting future liability. If a terminated employee obtains comparable employment thereafter, the employer may argue that the employee cannot seek any additional “front pay” damages in a lawsuit. Further, providing employees with outplacement services engenders a great amount of goodwill toward the employer.

Final Paychecks

If an employer terminates an employee, the wages earned and unpaid at the time of termination are due immediately. If an employee resigns from employment, the wages earned and unpaid are due not later than 72 hours. However, if the employee has given at least 72 hours’ notice of resignation, the employee is entitled to payment of all wages earned and unpaid at the time of actual last day of work.

If an employer fails to pay an employee who is terminated or who has resigned as set forth above, the employee may be entitled to receive “waiting time” penalties. These penalties will be a day’s pay for every day the employee had to wait for payment of wages, up to a maximum of 30 days’ pay. The rate of pay is determined by the employee’s overall compensation, including commissions, overtime, bonuses, etc. Also, there may be personal liability for employees who violate California wage orders.

Employment References

When it comes to requests for employment references, “just say no.” Any information provided by the employer can lead to litigation by the former employee for defamation, and/or the third party provided with the information for fraud. Employers should have a written policy that they only provide the employee’s date of employment and position in response to requests for references. Avoid any “off-the-record” comments. Ensure that all reference requests are directed to Human Resources. Train all employees concerning this issue, especially managers.

Workplace Violence

Unfortunately, there has been an increase

in acts of workplace violence as a result of layoffs, downsizing, and reductions in force due to economic problems. Employers must always consider the potential for workplace violence when making these important decisions.

Employers should train employees to identify early warning signs, which include: excessive absenteeism or tardiness; serious performance decline; unresolved or ongoing disputes; a personal crisis period, either domestic or financial; frequent mood swings; overly aggressive behavior; brooding, distrustful, or agitated; paranoid, obsessional, or delusional; fascination with weapons; obsessed with violence; loners with no support systems; and/or deteriorating grooming habits. Encourage employees to report unusual behavior of co-workers to management. However, employers must carefully balance the privacy rights of employees with the need to prevent violence in the workplace.

Employers must be extremely cautious during the actual termination. Have a witness present. If you believe the employee may become violent, notify security in advance and have them prepared for any potential danger. If you think there is a risk, the employee should be discretely escorted off the property by security. Keys should be confiscated. Also, immediately change computer passwords, security codes, and other access. If the employee refuses to return these items, management should change locks, etc.

Most acts of violence occur within 72 hours of the triggering event, such as a termination. Provide extra security when necessary, since it is a small price to pay for safety. Have a good security service on call so they can show up at a moment’s notice. Don’t be afraid to call the police if necessary.

In problem cases where threats and/or violence have occurred, you may need to get a restraining order before you serve them with termination notice. The Workplace Safety Act allows employers to obtain restraining orders against any individual who has threatened or committed an act of violence against one of its employees, without the employee’s cooperation or consent. The issue of whether to obtain the restraining order is one that should be carefully considered with experienced labor counsel, since this option is not appropriate for every situation.

By carefully considering the issues addressed herein, employers will be better prepared to protect themselves and their employees when making these difficult decisions.