

CONSIDERATIONS FOR

Conducting Layoffs and Other Reductions in Force

Preliminary Considerations

If an employer determines that reducing labor costs is necessary to ensure a business's continued viability, it should first consider the following options to demonstrate that it evaluated less severe measures before resorting to layoffs:

- A hiring freeze on affected units or departments
- A pre-layoff promotion and transfer freeze

Failure to take these steps can make defending a RIF more difficult in any future litigation. For example, judges and juries may find it suspicious that a recently-promoted and presumably well-performing employee was terminated in a performance-based layoff. Similarly, a business unit may have difficulty defending a layoff based on business economic reasons if it recently hired new employees.

Temporary Cost-Saving Measures Before Any Layoff

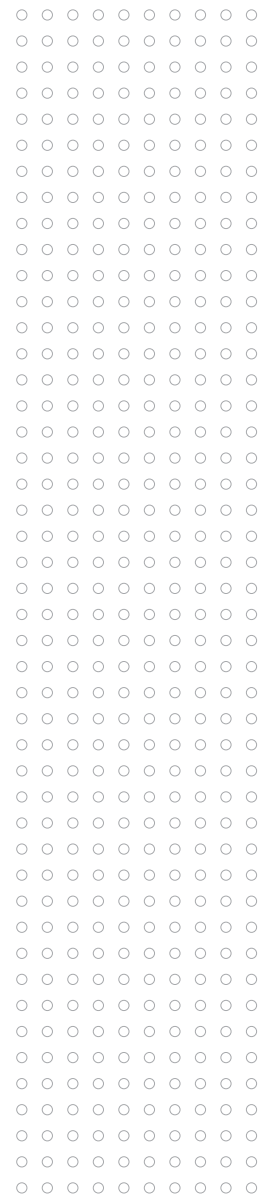
Employers should consider less drastic alternatives to laying off employees, including:

- Implementing a furlough
- Reducing employees' hours for a temporary period
- Reducing employees' pay for a temporary period

Potential Pitfalls: Compliance with Other Legal Obligations

While furloughs and other temporary cost-saving arrangements have many long-term benefits, they must be carefully structured to comply with the Fair Labor Standards Act (FLSA) and state wage and hour laws. For example, certain cost-saving measures may jeopardize the exempt status of salaried exempt employees under the FLSA. Failure to comply with these laws can also lead to significant liability, including liquidated damages, attorneys' fees, and triple damages.

In addition, employers that sponsor foreign workers for a green card or nonimmigrant visa status may have additional obligations to notify the United States Citizenship and Immigration Services (USCIS) or Department of Labor (DOL) in the event of a furlough, pay reduction, or hours reduction. Employers that must obtain Labor Condition Applications (LCAs) in support of H-1B, H-1B1, and E-3 work visas generally may not change the essential terms and conditions of the foreign worker's employment without first notifying the USCIS or the DOL, or both.



Risk of Losing Exemption for Salaried Exempt Employees

The primary risk of implementing these temporary cost-saving measures is that any loss of compensation for exempt employees may result in a loss of their exempt status under the FLSA, requiring the employees to be paid applicable minimum wage and overtime pay. To remain exempt from overtime employees generally must be paid on a salary basis. The general rule for salaried/exempt employees is that they are required to be paid if they perform work at some point during the workweek. Unless your business is shut down (or an employee does not perform any work) for more than an entire workweek, your exempt employees are generally entitled to be paid for the entire week in which they worked. Likewise, exempt employees must be paid a minimum salary of \$35,568 annually or \$684 each week. The total annual compensation requirement for highly compensated employees will be \$107,432 each year. Additional requirements include:

- The employee is paid on a weekly or less frequent basis (for example, monthly)
- The employee receives, during each pay period, a predetermined amount comprising all or part of the employee's compensation
- The employee's salary may not be reduced because of either the quality or quantity of the employee's work
- The employer must not take impermissible deductions from the employee's salary

Attempting to reduce labor costs by reducing an exempt employee's predetermined salary (for example, by occasionally asking exempt employees not to come to work one day a week and making a corresponding reduction in their salary for those weeks) generally violates the salary basis test and jeopardizes the exemption for both:

- The affected employee
- All similarly situated employees

However, an employer may reduce an exempt employees' total annualized salary amount. For example, an employer may reduce an exempt employee's annualized salary from \$65,000 to \$50,000.

Concerns about losing exempt status generally do not apply to nonexempt employees. Employers must pay non-exempt employees only for hours actually worked. If state laws or contractual provisions do not dictate otherwise, an employer can lawfully require hourly nonexempt employees to take one unpaid day off per week. However, employers must continue to pay non-exempt employees at least minimum wage for all hours worked and overtime under the FLSA and applicable state wage and hour laws.

State wage and hour laws may also limit an employer's ability to impose a desired cost-saving measure. For example, some states require employers to provide a certain amount of notice before reducing pay or changing an employee's work schedule. Some states also impose higher minimum wage requirements or weekly salary thresholds than the FLSA.

Reducing the Risk of Losing Exempt Status

Employers may be able to decrease labor costs while also reducing the risk of losing employees' exempt status under the FLSA by using:

- Full-week shutdowns. Employers can use furloughs in full week increments to avoid making improper salary deductions. This option is lawful because employers must only pay exempt employees a set salary in any week in which work is performed and conversely do not need to pay employees for any week in which no work is performed. If this option is used, however, it is vital to ensure affected exempt employees do not perform any work during these weeks. Any work performed triggers the obligation

to pay employees their full salary for that entire week, even if the work is minimal. For example, an employee who checks email from home for a few minutes on just one of the days can trigger the obligation to pay that employee for the entire week. As a practical matter, however, it may be very difficult to prevent an employee from performing any work. To avoid this problem, employers should:

- Formally prohibit employees from performing any work at all during these weeks and clearly communicate the prohibition; and
 - Consider eliminating employees' access to work communication during applicable non-working weeks, for example, by blocking access to company email communications and prohibiting nonexempt employees from taking home work laptops, Blackberries, or other communication devices.
- Reduced workweek schedule and pay. Employers can also prospectively adopt a reduced workweek schedule and a commensurate adjustment in employee salaries to avoid violating the salary basis test and jeopardizing the exemption, if the salary reduction is a bona fide change reflecting long-term business needs. To reduce the risk of losing employees' exempt status, employers should clearly notify employees before implementing the reduced workweek and salary plan. The notification and the accompanying details should be in writing and, preferably, provided at least one week in advance. Some states require more advance notice. The reduced salary plan also must continue to satisfy the salary basis test.
 - Requiring use of vacation time. While the FLSA allows an employer to require employees to use vacation or paid time off as a cost-saving measure, many state laws prohibit or significantly limit an employer's ability to do so. Employers should be familiar with the limitations on requiring the use of vacation time or paid time off under applicable state law.

Permanent Cost-Saving Measures

When employers determine that a permanent layoff is necessary, employers have two options:

- Voluntary reductions. Employers may implement voluntary RIFs with special benefits offered to those who leave. These are often referred to as exit incentive programs.
- Involuntary reductions. Employers may always make involuntary reductions of at-will employees, subject to their obligations to comply with all applicable federal, state and local laws, such as laws prohibiting discrimination, harassment, and retaliation. Reductions of employees employed under for-cause employment agreements require compliance with the termination provisions of these agreements.

Each of these measures requires careful planning and implementation. Employers should record the reasons for taking these measures to demonstrate a business justification and minimize the risk of disparate impact discrimination and other legal claims. A lack of documents significantly enhances the ability of the affected employees to argue that prohibited factors (such as a discriminatory or retaliatory motive) were considered.

Avoiding Disparate Impact and Retaliation Litigation

An employer implementing a RIF must carefully consider its layoff selection criteria to prevent a disparate impact on employees in a particular protected class (where, for example, employees in a protected class, such as race or age, are affected more than what would be statistically expected given the demographics of all employees in the selection pool). This can involve various statistical analyses. Employers also should avoid any implication that employees were selected for having engaged in prohibited activity, such as making a discrimination complaint.

Employees Who Have Recently Engaged in Protected Activity

To minimize the risk of retaliation claims, employers should be careful to avoid the appearance of retaliating against employees who have recently engaged in protected activity (for more information about retaliation claims. Protected activity might include:

- Making internal complaints
- Making complaints to government agencies
- Bringing or testifying in lawsuits against the employer
- Opposing allegedly unlawful activity
- Participating in an internal investigation or agency audit
- Requesting or taking a protected leave of absence

Employees on Medical or Military Leave

An employer implementing a RIF must particularly consider how the reduction might affect employees on protected medical or military leave and their right to reinstatement, as well as those who recently returned from leave. This is generally a fact-specific analysis that can implicate various federal laws, including the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Uniformed Services Employment and Reemployment Rights Act (USERRA), as well as state law.

Protected Class Employees

In addition to actions under federal and state leave statutes, an employer can face claims for discrimination under anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the ADA, and state and local anti-discrimination laws, when an employee who is a member of a protected class is selected for a RIF. These actions commonly include claims for:

- Intentional discrimination or disparate treatment.
- Disparate impact.
- Wrongful termination in violation of public policy.

Minimizing Risk of Discrimination Claims

Employers can reduce the risk of former employees bringing discrimination claims by:

- Ensuring there is a well-documented basis for a RIF based on legitimate business reasons
- Documenting the decision-making and selection process
- Using objective, consistently applied selection criteria
- Where subjective criteria must be used, applying objective evaluation guidelines to the selection decisions and documenting the legitimate, non-discriminatory reasons for each decision
- Conducting a disparate impact analysis of the selection list to ensure no protected class is disproportionately affected
- Where a disparate impact analysis reveals a disparate impact, making legitimate and non-discriminatory adjustments as necessary
- Reviewing selection decisions to ensure they are consistent with stated layoff goals

- Reviewing layoffs of individuals on protected leave or who recently returned from leave to ensure they are consistent with stated layoff goals and to ensure those individuals are not disproportionately affected
- Using a severance package or plan with a legally enforceable release of claims
- Complying with the Older Workers Benefit Protection Act (OWBPA) and similar state laws

Documenting Actions

An employer may face significant liability unless it can show legitimate, non-discriminatory reasons justifying its termination decisions. Therefore, managing legal risks associated with a workforce reduction requires careful planning and documentation. Employers should:

- Develop objective selection criteria that support selecting one individual over another.
- Identify and document underlying business reasons and objectives for all decisions.

Employers should ensure the documentation accurately reflects their objective criteria and business justifications, without subjective commentary, as these documents would be discoverable in any litigation challenging the RIF.

Selection Criteria

Employers should use objective, non-discriminatory and consistently-applied selection criteria. Adopting pure seniority-based layoff criteria is the best way to minimize liability exposure. Other layoff selection criteria that have withstood legal scrutiny by some courts include:

- Performance (supported by underlying documents such as a performance evaluations or performance ratings)
- Special skills
- Productivity
- Elimination of:
 - an entire job function
 - a particular department
 - redundant positions

Using high compensation levels as a selection criterion is not considered disparate treatment if it is not motivated by age. However, using this criterion can leave an employer more vulnerable to disparate impact claims under the ADEA because higher earning individuals tend to be among the older and more experienced employees.

Employers should avoid using subjective criteria to make selections for a RIF, as they allow laid-off workers to claim that decision-makers' true motives were discriminatory and that the subjective factors were a pretext for unlawful decisions. When subjective criteria are used to distinguish between employees, a sound case for individual layoff decisions should be made and documented by:

- Assigning lay-off selections to group or departmental level managers to:
 - Ensure selections are made by management personnel with personal knowledge of the employees at issue
 - Avoid claims that selections were centralized rather than made based on individual job qualifications and therefore were more susceptible to class treatment

- Creating an independent review committee comprised of decisionmakers of diverse races, sexes, and ages, including individuals who are not in the affected employees' chain of command and people from different parts of the organization, to:
 - Review the layoff selections made by group or departmental level manager
 - Increase the objectivity of the decision-making process
- Educating the decision-makers on anti-discrimination laws, particularly the ADEA

When making layoff decisions, employers should:

- Not rely solely on past performance evaluations and performance ratings. Although performance-based selection criteria have withstood court scrutiny, performance evaluations and reviews are often written in highly complementary terms and are not designed for comparing employees based on skills or business needs.
- Develop special performance ratings specifically for the layoff rather than using existing performance assessment tools. New ratings should consider matters like:
 - relative skills
 - knowledge and training levels
 - ability to perform remaining work
 - other relevant qualifications

Whatever criteria are chosen, they must be applied uniformly to evaluate the candidates to minimize discrimination claims. An employer should write the guidelines used for layoff selections assuming that a judge and jury will see them in the future. If possible, multiple raters who know the affected employees should make independent evaluations without any knowledge of ratings given by other raters. The selection decisions and accompanying reasons for each candidate selected should be well documented.

Selection List

Once a proposed list of individuals slated for layoff has been prepared, the employer should take the following steps to minimize liability and make it easier to defend any layoff decision:

- Conduct a disparate impact analysis with legal counsel under the protection of the attorney-client privilege
- Adjust layoff selection procedures to preclude a disparate impact of the layoff on any protected groups.
- If not already created, consider creating an independent review committee that includes minorities, women, and older workers to assess the tentative layoff decisions to ensure compliance with current guidelines.
- Have the independent review committee or a *senior human resources professional review selection decisions* to ensure:
 - The selection decisions comply with current guidelines and are consistent with the stated RIF goals;
 - Selection decisions affecting individuals on leave are consistent with stated RIF goals and that individuals on protected leave or who recently returned from leave are not disproportionately affected by the layoff; and
 - No employees selected for the RIF can claim retaliation for protected activity, such as preexisting claims, internal complaints, taking or requesting protected leave, or whistleblowing activities.

Severance Packages or Plans

A severance package or plan (including voluntary exit incentives) can help minimize risks of liability associated with a layoff by requiring a release of legal claims the individual might otherwise have brought against the employer in exchange for the severance payment. Packages and plans must be thoroughly reviewed for legal compliance and drafted precisely to ensure compliance with the Employee Retirement Income Security Act (ERISA), Internal Revenue Code (IRC), and the OWBPA.

If severance is offered in exchange for a release of claims against the employer, there must be sufficient consideration for the agreement, meaning that the employer is providing the employee a benefit he was not already entitled to receive. The severance agreement cannot simply offer payment already owed to the employee.

A severance agreement should explicitly release the employer from claims the employee could have brought for issues that arose before and up to the date of the agreement, including claims relating to the termination of employment and other potential claims under federal, state, and local law. A well drafted severance agreement should also remind employees of obligations that continue after the termination date, such as non-compete, non-solicitation, and non-disclosure covenants. Clients should seek guidance from their labor and employment counsel regarding the use (and drafting) of a separation agreement.

If severance is only being offered to a portion of the layoff group, objective criteria should be used to determine eligible individuals to minimize the risk of discrimination claims.

Limitations of Releases

Even well drafted releases have limitations. While employees usually may waive many of their rights in a private release agreement, they may not waive certain rights. For example, many courts have held that private compromises of certain claims under the FLSA are invalid and that releases of certain FLSA claims must be supervised by a court or the DOL. In addition, an employee's waiver does not prevent the EEOC or another government agency from litigating the matter on the employee's behalf, although employees can waive their right to monetary relief in these administrative proceedings.

Release agreements may effectively waive an employee's right to bring a class or collective action against the employer. However, at least one circuit court of appeals has held that a class waiver in a separation agreement is only valid if it contains an arbitration provision.

Some employers avoid offering releases because they fear prompting employees to seek the advice of counsel may eventually lead to a lawsuit. While this is a real concern, it is best for employers to obtain releases to reduce overall liability exposure.

OWBPA and State Laws

Releases must comply with all federal and state laws. The OWBPA, for example, imposes strict requirements on employers who ask employees aged 40 years or older to sign a release. Specifically, the OWBPA requires that releases be entered into knowingly and voluntarily by the employee, which requires the following in the context of a RIF of two or more employees:

- The release be written in plain language in a manner that is understandable
- The employer to specifically advise employees to review the agreement with an attorney before signing. Best practice is to include this advice in the written release
- The release to reference the ADEA
- The release to not include a waiver of rights or claims that may arise after the date the release is signed
- The employer to provide employees at least 45 days to consider the release before signing it and seven days to revoke the release after signing it (only 21 days is required for one employee aged 40 and over being terminated to consider a release before signing, but the seven-day revocation period still applies). The employee may

waive all or part of the 45-day consideration period and sign the release before the end of that period if the waiver is knowing and voluntary, but the employee cannot waive or shorten the seven-day revocation period. Best practice is to include these timeframes in the written release.

- o The employer to disclose certain information to employees related to their termination, which is usually provided in an exhibit or addendum to the release agreement. The required disclosure includes information about:
 - The class, unit, or group of individuals included in the exit incentive or employment termination program
 - Any eligibility factors for the exit incentive or employment termination program
 - Any time limits applicable to the exit incentive or employment termination program
 - The job titles and ages of all individuals eligible or selected for the exit incentive or employment termination program
 - The ages of all individuals in the same job classification or organizational unit who are not eligible or were not selected for the exit incentive or employment termination program

Benefit Plans

COBRA Election Notice

Under the Consolidated Omnibus Budget Reconciliation Act (COBRA), employers must offer group health plan continuation coverage (commonly referred to as COBRA coverage) to all covered employees (qualified beneficiaries), and their spouses and dependent children, who lose coverage due to a layoff or reduction in hours. An employer has 30 days to notify the plan administrator of a termination of employment. The plan administrator then has 14 days to provide a COBRA election notice to qualified beneficiaries. If the employer is also the plan administrator, the employer has 44 days to provide a COBRA election notice.

Failure to provide timely notices required under COBRA can result in:

- o Hefty per-day penalties under ERISA
- o Excise taxes under the IRC

Certain small employers may not be subject to federal COBRA requirements. However, state continuation coverage rights may apply.

Health and Welfare Plans

When implementing a short-term furlough or RIF, an employer should also review employee benefit plans and insurance policies to determine when coverage ends. Disability insurance carriers are particularly strict about requiring that employees be actively at work for coverage to apply.

When an individual's coverage under an employer's health plan ends, the individual may have the right under the benefit plan or state insurance law to convert the coverage to an individual policy. Conversion notices are usually required once coverage of an insured health plan ends. An individual may be entitled to receive a conversion notice as part of this conversion option, and an employer should review the governing plan or policy to determine when this notice should be provided. These conversion rights and related notice obligations may also be governed by state insurance law.

Qualified Plans

Depending on the type of qualified plan maintained by an employer, if any, a RIF may also trigger employees' rights to obtain 401(k) plan assets. Many defined contribution plans (such as 401(k) plans) allow employees to receive a distribution of their account balances on termination of employment. Employees generally cannot obtain distributions of accrued benefits under a defined benefit pension plan before reaching a retirement date

defined in the plan. However, depending on the number of participants terminated, a partial termination of the plan may occur. In general, a termination of 20% of a workforce is presumed to be a partial termination that requires all participants to be 100% vested.

Some qualified plans provide for subsidized benefits in the event of a plant shutdown. Employers should review the qualified plans they sponsor to determine if these types of benefits are provided.

Other Considerations

Agreements with Employees

An employer that determines that a RIF is necessary should review all relevant agreements, policies, practices, and oral representations to determine whether they limit the employer's ability to layoff the employee(s) or reduce their hours without imposing additional obligations (such as severance pay).

Unionized Facilities

Layoffs in unionized facilities present other concerns, as they can trigger obligations:

- Under existing CBAs
- To bargain with the union over the contemplated decision and its effects

Notice Requirements for Plant Closings and Mass Layoffs

An employer may have to provide notice to several parties of an impending RIF. The federal Worker Adjustment and Retraining Notification Act (WARN Act) requires that covered employers provide 60 days' advance notice of a covered plant closing or mass layoff unless limited exceptions apply (notably that the affected company is faltering despite its best efforts, unforeseeable business circumstances arise or a natural disaster occurs). For more information on the WARN Act generally, including which employers are covered, which plant closings and mass layoffs trigger notice obligations, and when layoffs must be aggregated.

The WARN Act also specifies how notice must be provided to the:

(See our Warn Act Checklist in the HUB Resource Center)

- Affected individuals
- Affected union (if applicable)
- Designated state entity
- Chief elected official of the unit of local government where the layoff or plant closing will occur

In addition, some states apply their own notice requirements on employers implementing a RIF (these state statutes are often called "mini-WARN Acts"). Employers should check the states where their layoff or plant closing will occur to determine whether state WARN Act requirements apply.

Immigration Obligations

Immigration obligations in the event of a layoff or RIF include:

- Document retention and destruction.
- Notice to government agencies.
- Payment of funds for transportation abroad.

Some of these obligations apply to all employers and others apply only to employers that sponsor foreign workers. For example, all employers must comply with the Immigration Reform and Control Act (IRCA), which mandates the completion and retention of Form I-9 for each employee. For employers that sponsor foreign workers, the employer's specific obligations vary depending on the type of sponsorship undertaken for each individual worker.

Employee Communications and Conduct

When implementing a RIF, employers should consider putting the following procedures in place to manage the process of informing employees.

Training

Consider holding briefing sessions to allow decisionmakers to ask questions and talk through criteria used in making RIF selections. All supervisors likely to participate in the RIF, especially those who interact with the selected employees, should be trained to:

- Ensure understanding of the employer's rationale for the RIF and all related programs and procedures.
- Effectively communicate the layoffs to employees.
- Understand and handle employees' reactions.
- Conduct actual terminations.

Supervisors should also be trained on the liability facing the employer if employees are treated unfairly or discriminatorily.

Notifying Employees

(See the Employee Information Sheet in the HUB Resource Center)

Announce layoff decisions in a meeting with the individual employee unless an entire facility or department is being closed. In meetings with affected employees, the employer's representative should:

- Meet with employees in a confidential setting and with at least one witness present (typically, another member of management or a human resources professional).
- Be honest, respectful, and empathetic, and thank the employee for his contributions.
- Advise affected employees of their benefits rights and provide information related to:
 - severance pay (if any);
 - COBRA coverage;
 - procedures for applying for unemployment compensation;
 - outplacement assistance; and
 - employee assistance programs.
- Consider explaining the selection criteria used in the layoff decision (for example, performance or elimination of an entire department). If the employee questions his selection for the layoff, he should only be advised of the criteria used in making the layoff selection decision, not his relative scoring or why he was selected instead of other employees. The employer should answer the employee's questions honestly, but without condescension or engaging in arguments.
- Consider offering to provide a reference if the employee signs an appropriate release form. A reference may be appropriate if the selection criteria were not related to performance or productivity and the employee's performance warrants a positive reference. However, employers who have a policy or practice of providing a neutral reference (for example, a reference that only confirms dates of employment and position(s) held) should evaluate whether providing a positive reference for some employees and not others may lead to disparate treatment claims.

- If appropriate, tell the employee that he may re-apply for a position with the employer if conditions improve and the employer hires additional employees in the future.

Employee Assistance

(Please connect with your employee benefits account manager regarding EAP programs that may be available through your employee benefits programs)

Several agencies and organizations are designed to aid dislocated employees in their transition. Information and assistance in contacting these organizations may greatly benefit many employees. Consider providing affected employees with contact information for the state unemployment agency and employee assistance programs. In some states, employers are required to provide this information in writing at the time of termination.

A plant closing can be traumatic for long-term employees. A staff counselor can help workers adjust to the notification and help minimize some adverse reactions among the workforce.

Employees frequently have follow-up questions that are not answered in the initial notification. A variety of methods exist to address follow-up questions, such as:

- Toll-free phone numbers
- Organized on-site worker information meetings
- Free distribution of written materials

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