

**Reduction in Force**  
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Terminating employees can be daunting and stressful; but, employers must remain objective and implement procedures that will avoid litigation and the statutory penalties that can arise with a reduction in force. This article will explore some of the major liabilities that are associated with reduction in force and ways to avoid them.

**Establishing Reasons for Reduction**

It is important to establish objective, business related reasons when implementing a reduction of a company's workforce, such as economic necessity, loss or downturn of business, consolidation of functions, and reorganization. Criteria must be grounded in ready, determinable facts which are well documented. In the event motives pertaining to release of specific employees are called into question, those documents will become critical evidence.

**Determining Which Employees Will Be Selected for Layoffs**

Determining which employees to layoff can prove to be a crucial part of the process. How does a company determine who will be laid off without inserting personal preferences and biases into the equation, which could be construed as subjective in a court of law? When making decisions regarding who is going to be laid off, an employer must consider any disparate treatment that such a lay off might create with regard to any of the protected classes of employees. The Employer must also take into consideration the regulations imposed by FMLA (Family Medical Leave Act), USERRA (Uniformed Services Employment and Reemployment Rights Act), the ADA (Americans with Disabilities Act), COBRA (Consolidated Budget Reconciliation Act), the ADEA (Age Discrimination in Employment Act), and, of course, union contracts.

**Seniority**

A standard procedure used to determine who will be laid off is length of service. The advantages include objectivity, clarity, and the ease with which the process can be administered. However, length of service is not without disadvantages. Strategically, the most senior employees may not hold the positions most valuable to the company or be the most productive employees.

**Performance**

Performance based procedures allows employers to keep productive employees and to remove those less valuable to the company. Performance based procedures most easily implemented are those that have been in place for a number of years and are well documented. When there is not a well documented history of the process, decisions will be open to interpretation by individuals wishing to challenge management. Furthermore, performance based procedures are inherently subjective when absolute objectivity should be the ultimate goal.

**Individual Employment Contracts & Employee Handbooks**

It is imperative to remember employees may have rights afforded to them in their individual employment contracts. Therefore, the employer must revisit these documents before

making any decisions. Employee handbooks should be examined to determine whether there are any additional rights afforded to employees. Employment contracts and employee handbooks may have provisions that grant certain rights of employment, rights during the termination process, and rights to benefits in the case of a termination.

### **Severance Packages & Waivers**

Severance packages provide many benefits – they allow a terminated employee additional security, raise morale among existing employees, and may aid employers in attracting sought after talent. Careful consideration must be given to any severance package offered. Benefit packages may be subject to the Employee Retirement Income Security Act (ERISA). The determination of whether a severance package is subject to ERISA is highly factual and circumstantial. As a rule of thumb, one-time non-discretionary payments (as opposed to long-term discretionary payments that require an ongoing administrative system) are not considered subject to ERISA. If a plan falls under ERISA, the employer is subject to a number of complex statutory obligations. A failure to comply with ERISA can lead to an imposition of serious penalties by the Department of Labor.

If a severance package is provided, the employer should consider obtaining a release from the employee for all claims against the employer. This release should also comply with the Older Worker Benefit Protection Act (OWBPA) in order to obtain a valid and binding release of all claims.

### **The WARN Act**

The Federal Worker Adjustment and Restraining Notification Act (WARN) applies to employers with 100 or more employees. The calculation of 100 employees does not include part-time employees, which is defined by the Act as those who have averaged less than 20 hours per week, or who have been employed fewer than 6 of the 12 preceding months. The threshold is 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of overtime).

If your company qualifies under the WARN Act, then it will be required to notify workers that the community 60 days in advance of (1) closures that affect 50 or more workers, and (2) layoffs that either (a) affect 50 or more workers who comprise one-third or more of the work force, or (b) involve 500 or more workers. There are a number of specific coverage exceptions and additional coverage definitions that may apply.

### **Downsizing Survivors**

In order for a layoff to be well executed, the employer must also take into consideration those employees that remain. They are likely to go through varying reactions to the layoff. These emotions typically range from relief to guilt for being one of the lucky ones, or anger, or anxiety that another round of layoffs is looming. Employee reactions to layoffs can have a direct impact on productivity and quality of service, so it is important for the employer to communicate with their employees, reinforce the mission of the business, and drive momentum to focus on the tasks at hand.

If your company is faced with a downsizing of your workforce, implementing objective procedures, complying with applicable laws, and openly communicating with remaining employees will allow for the smoothest transition possible.