



How to Conduct a Layoff or Reduction in Force

Conducting a layoff is a difficult process that some businesses may have to face. The basic compliance components to review during the layoff/RIF process are outlined below.

Step 1: Select Employees for Layoff

After an employer has designed its future organizational structure, a system for determining who will stay and who will go must be created. The selection criteria should be designed to identify the employee traits that will be instrumental in meeting the company's goals. Several factors can be used in deciding the selection process (www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Pages/selectingemployeesforlayoff.aspx), including seniority, performance, job classification or job knowledge and skills. However, an organization should not consider criteria such as leave status or protected conduct (i.e., whistle-blower). By aligning the future goals of the organization with the best selection process, the company will be able to determine its success going forward.

Step 2: Avoid Adverse Action/Disparate Impact

An organization should review the selected employees for layoff to determine if an adverse (disparate) impact exists for a protected class. Protected classes include individuals who are members of a certain race, color, ethnicity, national origin, religion, gender, genetic information, age (40 or over), those with a disability or those who have veteran status. States may have additional protected classes, such as sexual orientation, marital status or smokers. Any protected class that may have a disproportionately larger percentage affected by the layoff (e.g., employees reaching retirement age) will need to be evaluated and substantiated.

Step 3: Review Federal and State Worker Adjustment and Retraining Notification (WARN) Act Regulations to Stay Compliant

Employers must determine if the WARN Act will apply. The WARN Act requires employers conducting a large-scale layoff to provide 60 days' notice to affected employees (few exceptions apply). Employers must inform affected employees if the layoff is permanent or temporary, and if the latter, what the expected duration is. Employees must be notified of their expected separation date, and if there are any bumping rights. Employers should clearly outline the process for recall rights and applying

for future positions with the company if applicable. In addition, a number of states have enacted "mini-WARN" legislation that extends notice requirements to smaller businesses conducting layoffs. Reviewing state laws will be important given that mini-WARN Acts often impose additional requirements that differ from federal law.

Step 4: Review Older Workers Benefit Protection Act (OWBPA) Regulations for Compliance

If releases from age discrimination are used in exchange for severance pay, they must comply with the OWBPA to effectively release claims under the Age Discrimination in Employment Act. The OWBPA addresses four different release scenarios, and each scenario contains five steps that must be followed to be compliant. Under the OWBPA, employers also need to provide workers age 40 and over a consideration period of at least 21 days when one older worker is being separated, and 45 days when two or more older workers are being separated. Additionally, employees must receive a revocation period of at least seven days.

During a reduction in force or as part of a voluntary exit incentive program, two additional requirements are needed to validate the releases. The employer must publicly identify the targeted employees, and secondly, the affected employees must be informed in writing of the job titles and ages of all individuals selected for the group program, along with employees in the same job classification or unit that were not selected for the program.

Step 5: Determine Severance Packages and Additional Services

Many employers offer severance packages to their displaced employees. A written severance package policy allows employees to realize the steps involved in the involuntary termination. Employers are not obligated to provide severance to laid-off employees under federal law, but severance packages may lessen the chance of legal action filed on behalf of former employees. Some states, however, have specific criteria for required severance. Severance packages may include salary continuation; vacation pay; continued, employer-paid period of benefits coverage; employer-paid COBRA premiums; outplacement services; counseling and resume workshops; and more.

Step 6: Conduct the Layoff Session

Sitting down with an employee who is about to be laid off will be difficult, but if handled professionally, it may reduce potential anger and resentment from the employee. Employers must ensure that they are prepared for this meeting and that all information has been collected and available to the employee. Employers will want to be sympathetic and explain the reasons for the layoff, review health benefits and COBRA election procedures, 401(k) options, outplacement services, and the rehire process, if available. Employers may also want to provide information on the unemployment process, along with any other job placement information available for displaced workers. It is also recommended to review the severance agreement with the employee and answer any questions the employee may have before leaving the company. Employers may also want to offer to answer any questions that employees may have over the next several weeks. If an organization has an employee assistance program, then this information should be provided as well to aid those employees and family members affected by the layoff.

Step 7: Inform Workforce of Layoff

Notifying the remaining workforce of the layoffs that were conducted will help squelch potential rumors. The employer may also want to communicate the company's financial position and its commitment to meeting company goals and objectives going forward with the current workforce. Many of the employees the employer is addressing had built strong friendships with the laid-off co-workers, and they will be anxious to know their future with the company as well. Employers should be prepared to honestly communicate and answer questions to keep morale and productivity high going forward. Employers will need everyone on board and aware of the future challenges to be successful.

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