

April 2009

Board Talking Points: Reductions in Workforce

When a nonprofit must reduce its staff due to economic reasons, the organization will need to take steps to ensure that layoffs will reduce costs without incurring costly lawsuits. It is critical that nonprofits have a well-supported business reason to terminate an employee due to economic reasons to reduce the organization's vulnerability to claims that discrimination was involved in the decision regarding layoffs. Similarly, employers should ensure that separated employees are treated with as much respect and dignity as possible. The following is a list of considerations to keep in mind when planning a reduction-in-force (RIF).

1. How do we begin to consider which employees to include in the RIF?
2. Do any employees have contracts or are any employees covered by a collective bargaining agreement? If yes, what are the contractual provisions for a layoff?
3. Does the employee handbook provide guidelines on how a RIF should be conducted?
4. Are any of the employees being considered for termination currently on leave?
5. Did the performance of the employees being laid off play a role in the decision? If so, will those employees be told that the decision was in part performance based?
6. Has the organization reviewed the demographics of the group to be laid off to determine if the RIF may be perceived as discriminatory?
7. Has the organization budgeted for payments due on termination, including severance pay (if any) and unused accrued vacation pay?
8. Does the organization have more than 50 employees? If so, has it analyzed whether the NYS Worker Adjustment and Retraining Notification (WARN) Act applies to the RIF?
9. Has the organization considered the use of releases to reduce the risk of liability?

Answers

1. How do we begin to consider which employees to include in the RIF?

The starting place is to consider what job functions rather than what individuals will be eliminated as a result of budgetary constraints. Next, develop objective criteria, for example, job function, job performance and seniority to evaluate individual employees. The business reasons for the RIF and justification for separating certain employees should be provided to the organization's board of directors.

2. Do any employees have contracts or are any employees covered by a collective bargaining agreement? If yes, what are the contractual provisions for a lay-off?

In New York State, most employees are considered to be "employees at will" meaning that an employee has no right to continued employment. An employer can fire employee at any time, for any reason, except a discriminatory one. Similarly, an employee is free to leave a job. When an employee has a contract, either as an individual or as part of a collective bargaining unit, it is that contract that will control the circumstances under which an employee can be terminated or the terms and conditions of their employment can be changed.

3. Does the employee handbook provide guidelines on how a RIF should be conducted?

The organization's employee handbook or policies should be consulted to ensure that procedures for selecting employees for a layoff, as well as any procedures for "bumping", i.e. efforts to place affected employees in other positions within the organization, are followed. If there is no applicable procedure, develop one so that all decision makers follow a consistent, objective process.

4. Are any of the employees being considered for termination currently on leave?

An employee on leave under the Family Medical Leave Act or on military leave is legally entitled to job reinstatement unless the job would have been eliminated even if the employee had not been on leave. However, unless all or most jobs in the same category as that of the employee on one of these types of leave have been eliminated, it may be difficult for an employer to prove that eliminating the employee's job did not violate the law. For employees on all types of leave, consider honestly whether the person would still lose his or her job if he or she were in the office today and performing according to ability. Even if the answer is "yes," there is a risk that terminating the person on leave will look like disability or caregiver discrimination. Consider waiting until the person comes back and re-evaluate performance after certain length of time.

5. Did the performance of the employees being laid off play a role in the decision? If so, will those employees be told that the decision was in part performance based?

When the decision to terminate an individual employee is based, at least in part, on the employee's poor job performance, the basis for that decision should be documented and the rationale shared with the employee. To minimize the risk of a wrongful termination claim, employers need to show that the decision to terminate an individual was not discriminatory. Rather, employers should demonstrate that the decision is based on (1) whether the individual has the skill sets needed to perform in the post-layoff workplace, and (2) job performance: measurable factors such as quality of performance, attitude on the job, productivity, attendance, punctuality, seniority, etc. Written employee evaluations, including documented performance problems, are critically important to support the decision.

6. Has the organization reviewed the demographics of the group to be laid-off to determine if the RIF may be perceived as discriminatory?

If a nonprofit is laying off a group of employees, review demographics of the group to be laid off to see if RIF has a “disparate impact” on members of protected classes (e.g. minorities, women, over age of 40, etc.). Even if there are justifiable business reasons for a layoff that disproportionately impact a particular group of employees, there are clear liability risks. Note whether any employee is about to vest any important benefits, such as pension benefits. It is important to obtain legal counsel in connection with a group lay off.

7. Has the organization budgeted for payments due on termination, including severance pay (if any) and unused accrued vacation pay?

New York law requires that any accrued, unused vacation pay must be paid within 30 days of termination (except for exempt employees earning more than \$900 a week). Consider requiring employees to take all or part of any unused accrued vacation to avoid large cash payouts upon termination. Keep in mind that there may be no way to recoup accrued unused vacation payments made to employees who are laid off following termination/non-renewal of a funding contract.

8. Does the organization have more than 50 employees? If so, has it analyzed whether the NYS Worker Adjustment and Retraining Notification (WARN) Act applies to the RIF?

The New York State and Federal Worker Adjustment and Retraining Notification (WARN) Acts require that certain organizations give advance written notice of a mass layoff, plant closing, or certain plant relocations. The New York State WARN Act (NYS WARN Act) is more expansive than the Federal WARN Act and places more stringent obligations on smaller organizations. Employers who were already covered by the Federal WARN Act will now be covered by the NYS WARN Act and also will need to comply with the New York requirements, including the significantly longer period for providing written notice.

9. Has the organization considered the use of releases to reduce the risk of liability?

Consider entering an agreement offering an employee who has been selected for layoff some type of benefit (e.g., severance, extra salary, pay for continued health insurance) in exchange for a release from liability for all employment-related claims. The benefit must be **in addition to** regular salary, unused, accrued vacation or anything else that the employee is already entitled to get. This is legally an extremely complicated area, particularly if the employee being terminated is over 40. It is important to have an attorney draft/review the agreement.

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