

The Worst of Times Demands the Best Employment Practices: Top 5 Tips for Layoffs

When the economy is hurting, individuals and companies alike are forced to make tough choices. How can we cut costs? How will we stay afloat? How can we do more with less? One of the toughest choices employers face in these times is whether to lay off employees. It's not an easy decision, especially when the people you are considering laying off are productive, loyal employees with families to support. In the event your company is forced to consider a layoff, there are several things you should do to make it less painful for your employees—and less costly for your company.

(1) CONSIDER AND TRY ALTERNATIVE SOLUTIONS.

Employees will feel a lot less resentment about being laid off if they see that the employer made every effort to reduce other expenses first and that the layoff is a last resort. Likewise, laying off employees while continuing to spend money on items that may appear excessive or unnecessary sends a bad message. Prior to implementing a layoff, try other ways to cut costs—for example, holiday bonuses, food at company meetings, the company retreat, a freeze on new hires. Some employees may be willing to accept a reduction in salary in exchange for working fewer hours. Let your employees know that the company is cutting these costs in an effort to maintain the workforce. Even better, invite the employees to brainstorm about ways to cut costs. If employees know that the company is doing its best to save their jobs, they are more likely to pitch in and help, rather than view the cuts as a hardship being imposed on them.

(2) PLAN AHEAD—IS A WARN NOTICE REQUIRED?

The Worker Adjustment and Retraining Notification Act (“WARN”) requires employers with 100 or more full-time employees to provide 60 days’ written notice of a plant closing or mass layoff to each affected employee. A plant closing is the shutdown of a single site of employment resulting in an employment loss for 50 or more employees. A mass layoff is a reduction in force (other than the result of a plant closing) that results in an employment loss of at least 33 percent of employees AND at least 50 employees, OR at least 500 employees. Employers who violate WARN are liable for back pay and benefits for 60 days.

Even if a WARN notice is not required, you should consider whether to provide advance notice to employees and, if so, how much is appropriate. Although notice may not be practical in all situations, giving employees the opportunity to plan ahead may prevent future lawsuits.



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(3) APPLY NEUTRAL CRITERIA IN MAKING THE DECISION.

What criteria are you using to decide which employees to lay off? Qualifications and seniority are legitimate business reasons to choose one employee over another; however, be careful that you aren't making the decision based on age, sex, race, religion, disability, or any other protected category. For example, Bob, who turns 50 and becomes eligible for retirement benefits at the end of this year, is rumored to be retiring at that time. Ted, on the other hand, is in his 30s and has a baby to support. An employer evaluating these two individuals may conclude that it makes more sense to lay off Bob, who is likely to leave at the end of the year anyway, than Ted, who has a young family to support and is more likely to stay with the company for years to come. An employer who chooses to lay off Bob based on this reasoning, however, may face a legitimate and costly claim of age discrimination.

Consequently, it is essential that an employer not only apply neutral criteria in making these tough choices but be able to prove, through documentation, that the decision was based on neutral criteria. If the standards applied are job qualifications, the employer's documents should show that one employee is clearly better qualified than the other. If one employee is not clearly better qualified than the other, then the safest criteria is seniority.

Do not make the mistake of failing to define the criteria, as those charged with making the decision (often immediate supervisors or managers) may tend to favor their "buddies" in the selection process, which may inadvertently give the appearance of unlawful discrimination.

(4) DO UNTO OTHERS.

Many discrimination lawsuits could be avoided if employers treated employees the way they would want to be treated. If you were the employee being laid off, would you want to receive your layoff notice via email? Would you want to receive the news at 5:00 p.m. on a Friday with no time to prepare? Would you want the employer to refuse to provide any information about the reason for the layoff?

Although informing an employee that he/she is being laid off is never pleasant, by delivering the news professionally and courteously, an employer can prevent an employee's anger and disappointment from channeling itself into a lawsuit. Think ahead: what will the employee's questions be and what information can you provide? With a little forethought, an employer can accompany the bad news with information—regarding benefits and severance, for example, that will help the employee make the transition to a new job.

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(5) DON'T NEGLECT THOSE WHO ARE LEFT BEHIND.

Layoffs can be demoralizing, both to those who are let go and those who are left behind. The ones who are left behind may feel guilty that their friends were let go and anxious about whether they will be next, and the employer may not be able to promise that additional cuts will not, in fact, be necessary. To help relieve the tension, cultivate open communication between upper management and the workforce. Provide as much information about the company's financial position as possible, and allow employees an opportunity to ask questions and voice their feelings.

In short, the more thought that goes into a layoff, the smoother the process will be. Through careful planning, you can avoid the costly litigation that sometimes follows a layoff.

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