

Layoffs **TERMINATION**

Revised: May 2018

Summary:

Whether the term is “layoff,” “reduction in force (RIF),” “downsizing,” “restructuring,” “reengineering,” “rightsizing,” or something else, the planned job elimination of positions or jobs is a phenomenon that has affected and continues to affect organizations and workers at all levels. For purposes of clarification, the term “reduction in force (RIF)” will be applied in this FYI.

This FYI is intended to provide summary information. Employers are encouraged to call Employers Council’s Employment Law Services Department with questions relating to legal considerations, and the Human Resource Services Department and/or the Career Transition Services office with questions relating to administering a RIF.

For additional resources, please see page 9.

Important Notice:

The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice. If the reader has a specific need or problem, the services of a competent professional should be sought to address the particular situation.

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I. Introduction

The planned elimination of jobs continues to affect organizations across all industries and workers at all levels. Unfavorable economic conditions, mergers and acquisitions, cost constraints, changing markets or business strategy and rapidly-changing technology are some of the reasons organizations consider reductions in force (RIFs). Although most RIFs are implemented to reduce costs, RIFs, ironically, are not without costs, whether they be legal (litigation, unemployment compensation) or human (decreased morale, trust and productivity; increased anxiety and fear). The most effective programs for minimizing the legal and human resource fallout of a RIF include careful planning and implementation.

Strategic Issues

Before implementing a RIF, consider the overall state of the organization from a business perspective. Taking a step back and examining the strategic issues involved are necessary before making any decisions. Consider, for example, the following:

- Where do you want to be in terms of achieving your mission, goals, and objectives?
- Where are you now?
- What are the gaps and how big are they?
- What must be changed or improved to close the gaps?
- What are the options in getting there?
- Over what do you have control? No control?
- What work adds value to customers/organization?
- What work is unnecessary and can be eliminated?
- What is driving the possibility of a RIF?
- How will the work get done after the cuts?
- Realistically, can you recover? If so, how long will it take?
- How closely have you analyzed the costs vs. the benefits of making the RIF?
- Do the benefits outweigh the cost savings?
- Alternatives to RIFs

After answering these questions, employers will want to consider if there are viable alternatives to RIFs. Studies indicate that RIFs do not always yield a positive economic or organizational outcome. This is particularly true when they are done quickly, without careful planning. After a RIF, some organizations have needed to re-hire former employees as consultants. Others have re-created expertise by training survivors to handle tasks former employees performed, merely shifting headcount costs to other types of expenses. Experience indicates that employees

surviving the cuts can become self-absorbed and risk averse, called the “survivors’ syndrome.” If employees believe management has not thoroughly explored cost reduction programs, remaining employees may respond negatively to future company efforts. Therefore, employers may want to consider if any of the following alternatives are viable.

Elimination of unneeded expenditures	Early retirement
Elimination of unfilled positions	Temporary layoffs
Employee buyouts	Non-paid vacations
Shared ownership plans	Hiring freezes
Salary freezes	Restricted overtime
Salary reductions	Retraining and redeployment
Voluntary leave without pay	Part-time versus full-time employment
Sabbaticals	Job or work-sharing
Reduced hours	Incentives to leave (voluntary layoffs)
Reduced workweek	Attrition
Rotating days off	Transfers within company/relocation

Planning a Reduction in Force

If a RIF is necessary, typically the better it is planned in detail, the better management will be prepared to handle the complex situation a RIF creates. Often financial managers want to implement the reduction as soon as possible to reduce expenses. However, it is wise to carefully plan the RIF to minimize dollars lost resulting from legal challenges, increased turnover, decreased productivity, and poor employee morale. In the planning process consider the following:

- Would it be more effective to make one deep cut or reduce staff a little at a time?
- Is there a need to offer stay bonuses to employees needed to complete projects or close out a division?
- Is it appropriate/required to give employees advance notice? If the Worker Adjustment and Retraining Notification Act (WARN) applies, advance notice is required.
- Is it appropriate/possible to grant severance in exchange for a Waiver and Release? If so, how much?
- Is it appropriate/possible to offer career transition services? If so, how much?

- Would it be appropriate to offer health insurance benefits beyond what is required by COBRA? Is the continuation of disability or life insurance fitting?
- Does it make sense to establish a recall provision? If so, what would be the parameters of a recall provision?

SELECTION CRITERIA

Choosing which employees to cut is one of the most difficult tasks in planning a RIF. Normally, employers begin by analyzing their business needs and objectives. Along with this assessment, it is important to identify the appropriate criteria for determining who to cut. To minimize potential legal risks, any selection criteria should be job related, objective, neutral, and consistently applied.

Examples of neutral criteria are:

- Seniority
- Performance ratings, skills/knowledge
- Attendance records
- Disciplinary records
- Employee status (part time, temporary)

Legal Considerations

Numerous legal challenges may result from a layoff or reorganization. Although courts clearly recognize and understand that there are legitimate circumstances that result in a RIF, employees still may challenge the procedures the employer used to select the individuals to downsize.

It is essential in planning for a RIF that an employer considers not only the laws, but also the actual planning and implementation process. By doing so an employer is prepared to defend potential legal challenges. It is critical for employers to:

- Carefully analyze and plan the organizational decisions being made.
- Document the business reason for the RIF, the organizational changes (before and after), and the selection criteria that will be used to select the impacted employees.
- Train managers and supervisors in the selection process for a RIF and how to document their decisions.
- Be absolutely truthful with employees concerning the reason for the RIF.
- Treat employees with dignity and respect.

Following are some of the laws that need to be considered in a reduction in force.

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

The Worker Adjustment and Retraining Notification Act is commonly referred to as the Federal Plant Closing Law. This law requires 60 days advance notice for a business closing or mass layoff under very specific conditions. Although the word “plant” is used in the WARN Act, this law applies to all employers and employees as defined in the law, not just “plant” or traditional blue-collar employees.

To be covered by the law, the employer must have 100 or more employees, excluding part-time employees or 100 or more employees who in the aggregate work at least 4,000 hours per week (not including overtime), but including part-time employees. A part-time employee is defined as an employee who works an average of fewer than 20 hours per week, or was employed for fewer than 6 of the 12 preceding months. In determining the number of employees to be counted for coverage, at the time the first notice is to be given employers must include temporary employees as well as supervisors and managers.

CIVIL RIGHTS LAWS

Civil rights laws prohibit employers from considering in any way factors such as gender (including pregnancy and related conditions), color, race, age, disability, and national origin in making RIF decisions. Before implementing a RIF, it is important to make sure that decisions will not cause an adverse impact based on protected characteristics, such as race, sex, or age.

An evaluation of the makeup of the group to be laid off in comparison to those being retained is important. If the group being laid off contains a greater percentage of employees in the various protected classes than the group being retained, an analysis of the basis for the layoff must be conducted.

RIF decisions need to be supported with job-related criteria which is unrelated to the employee’s race, sex, or other protected criteria. Documentation by supervisors and managers with respect to performance and discipline will be critical if these factors contributed to the layoff decision. If a RIF decision is challenged, the courts and agencies will look to see what, if any, documentation exists and whether that documentation is consistent. The lack of documentation or inconsistent documentation can lead to adverse decisions.

CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT OF 1985 (COBRA)

Involuntary termination, such as that experienced in a reduction in force, is a “qualifying event” that triggers COBRA continuation coverage for an employee. In order to qualify for COBRA coverage, the individual must be covered on the day before the qualifying event (such as a RIF). Generally, an employee (and dependents if family coverage was originally selected) who is laid off is eligible for 18 months of COBRA continuation coverage by paying the required premiums. See the Employers Council FYI *COBRA: Overview* and *COBRA: Overview_sample* for additional information.

UNEMPLOYMENT COMPENSATION

Employees who are laid off from work are eligible for unemployment benefits. Unemployment compensation is based on the principle that claimants must be unemployed through no fault of their own. Full awards are granted to claimants who are laid off from work.

An employer may realize savings in employee salaries; however, those savings may be offset by an increase in the employer's unemployment tax rate. Therefore, whenever possible, offer job openings to laid off workers who have filed claims for unemployment benefits. If the offer is refused, the local unemployment office in which the claim was filed should be promptly notified in writing.

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)

Severance pay policies may be considered employee welfare benefit plans under ERISA, even if the employer's plan pays severance benefits from the employer's general assets, rather than from a trust fund. Even so-called informal plans, where no written policy exists and employers pay severance benefits on the basis of past practice, have been held to be ERISA plans.

Because severance plans may be employee welfare benefit plans covered by ERISA, they are subject to ERISA's reporting and disclosure requirements. Thus, severance pay plans should be described in a formal Summary Plan Description (SPD), which must be provided to all plan participants (covered employees) and also must be filed with the Department of Labor.

FAMILY AND MEDICAL LEAVE ACT (FMLA)

Under the FMLA (Sec. 825.216) an employee on FMLA leave has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

OLDER WORKERS BENEFIT PROTECTION ACT

This Act amends the Age Discrimination in Employment Act of 1967 to clarify the protections given to older individuals in regard to employee benefit plans and for other purposes. When applicable, information about the ages of both terminated and retained employees, as well as disclosures regarding waiver of rights and claims, must be provided to employees covered by the Act.

COMMON LAW CLAIMS

Review policies, procedures, handbooks, manuals, offer letters, individual employment contracts, and other documents to ensure that proposed selection criteria and methodology will not breach any express or implied contract of employment.

Since there could be numerous legal implications, employers are advised to document their decisions relating to a RIF in the event of a legal claim.

Administering a RIF

The process for implementing a reduction in force is as important as the process of determining that one is necessary. Employees will remember how they were treated as vividly as they will remember the loss of their job. Survivors of a RIF will form opinions about their jobs and the company based on the way outgoing employees are treated. The following checklist provides some of the considerations for administering an effective RIF.

WHEN?

- Consider impact on current project/business needs as well as particular circumstances surrounding the situation and what is best for everyone concerned.
- Plan day and time avoiding Friday, if possible, as that would place laid-off employees at home for the weekend with little else to think about.
- Coordinate a team of management members (usually a Human Resources representative, manager, and/or supervisor) who will need to be present for the RIF process. This team will then work with the individuals or groups affected by the RIF.
- Coordinate timing between departments/other locations.
- Provide advance notice considering WARN Act notification requirements as necessary.

WHERE?

- One-on-one (preferable).
- Group or department announcement (consider appropriate location, e.g., conference room).
- Other considerations: use a private location for individual notification; consider employees' reactions/emotions, good-byes, easy egress, and security arrangements.
- Have a career transition representative available if using career transition services,

WHO DELIVERS THE MESSAGE?

When done individually, usually the employee's manager and a Human Resources representative are present. When done in a group, often a department supervisor or manager provides notification to employees with Human Resources present. In a large RIF, it is important that the head of the organization (CEO, President) be present, typically breaking the news with support of other members of management and Human Resources.

ENSURE CONSISTENCY OF THE MESSAGE AND ITS DELIVERY.

- Have a list of frequently asked questions and answers that are consistent with management practices.
- Decide who will explain benefit and pay information (typically a Human Resources representative). In some cases, details should be provided later due to expediency issues.
- Train supervisors/managers in responding to questions and conducting the job separation discussion; be prepared; know what to say; practice with someone.
- Have packets/information ready.

WHAT TO SAY?

- Open with a general statement and get to the point quickly.
- Succinctly state the business reasons for the RIF and the criteria used to determine who and how positions for layoff were determined.
- Emphasize that the decision is final, not here to debate.
- Be clear about the actions being taken.
- Express genuine regard for the impacted employee.
- Treat the employee with dignity and respect.
- Thank them for their contribution.
- Explain company support, e.g., career transition services, as applicable.
- Avoid platitudes and promises.
- Do not get defensive.
- Avoid “counseling.”
- Allow the employee to vent within reasonable parameters.

WHAT CAN YOU PROVIDE?

- Personalized letter explaining the staff reduction in detail
- Notice period, if applicable
- Final paycheck, including earned, unused vacation
- Severance and how it is determined
- Other monies owed to employee
- COBRA/State Healthcare Continuation Notice (use established COBRA procedure, note deadlines, etc.)

- Conversion of benefits
- Distribution of benefits (401(k), profit sharing)
- Employee Assistance Program (Extended use? May be COBRA qualifying plan.)
- Unemployment compensation contacts
- Career Transition Services
- Reference policy
- Reminder of confidentiality agreements, etc.
- Any tax implications
- Eligibility for recall/rehire, if applicable
- Waiver and Release letter/information
- Exit interview, if applicable
- Retiree benefits information, if applicable
- OWBPA disclosures regarding waiver of rights and claims and information about the ages of both terminated and retained employees, if applicable

Other Considerations

EXITING PROCEDURES

- Verification of address (for sending W-2s at end of year, COBRA, benefits notices, etc.)
- Availability of employee's emergency medical contact numbers, if needed
- Checklist for termination (keys, ID badges, etc.)
- Return of company property (computer, cell phone, pager, tools, equipment, uniform, credit card, etc.)
- Completing work
- Saying good-bye, if appropriate
- Boxes available for packing
- Transportation from office
- Security precautions, if appropriate
- Computer access changed

FOLLOW UP

- Call affected employee(s) a few days later to:
- See if they have any questions or continuing concerns about benefits
- Remind them of any career transition services offered

MANAGING THE SURVIVORS

As soon as possible after the reduction in force process is completed, it is important to communicate with the employees still with the organization. Survivors are often a group whose interests are forgotten. The communications must be consistent with what the terminated employees were told, and should include the following:

Immediate announcement of RIF, including:

- Efforts to avoid
- Why necessary
- Criteria for selecting employees/jobs
- Services being provided to those employees
- Senior Management and HR availability to respond to questions and concerns
- Heightened visibility and accessibility of management
- Communication of company goals and action plans

Summary

There are some cases in which a RIF is the only solution. However, it may not be a quick-fix solution to enhance competitiveness and/or reduce costs. The costs may far exceed the hoped-for gains, especially if companies are not well prepared to administer a RIF. When a RIF is necessary, distress to the organization and its employees can be eased by thorough and careful planning, execution, and communication.

Additional Resources on this Subject

A. SEMINARS

COBRA Workshop

Benefit Administration: The Basics From A to Z

Fundamentals of Human Resource Management: Key Steps in Getting Started

Measuring HR: Quantifying Results

Legal Issues in Managing Employees

Unions: Understanding Your Collective Bargaining Agreement

Change Management: Building Resiliency

Negotiation for Win/Win Results

Organizational Development Certificate Program

Career Transition Services: Career Skill Building Workshop

Retaining and Engaging Employees: What Employees Really Care About

Workforce Planning: Your Roadmap to the Future

Team Development: Assessment and Facilitation

Team Development Modules for On-site Training

Unemployment Insurance: Challenging Claims and Controlling Costs

B. REFERENCE MATERIAL

FYI	Effective Career Transition Services
FYI	Terminations
FYI	WARN Act – Overview
FYI	COBRA Regulations
FYI	COBRA Overview
FYI	Colorado Health Care Continuation
FYI	Documenting Performance/Behavior

C. EMPLOYERS COUNCIL SERVICES

Career Transition Services

Human Resources

SAMPLE REDUCTION IN FORCE LETTER

(To be modified by employer for particular situation.)

Dear _____:

Unfortunately, due to _____, a reduction in force is necessary, and therefore your position with the _____ Department will be eliminated as of the end of (date, shift).

(Company Name) appreciates your efforts and hard work since (time frame).

To assist you through the transition that lies ahead, there are several items to bring to your attention. They include:

- **Letter of Introduction to Prospective Employers** (five copies included in your packet) **NOTE:** Employer may not wish to provide reference letters to some; in which case, they probably should not provide reference letters to anyone. See the Employers Council FYI *Reference Checking: Providing References* for more information.
- **Insurance Coverage** - Your medical and dental coverage (vision, etc.) will continue through _____.
- **COBRA** - The COBRA Notification Form and Letter will be sent to your home address within two weeks after (last day of work). COBRA coverage allows you the opportunity to continue your current health coverage for up to 18 months at your own expense.
- **Final Paycheck** - Your final paycheck will be issued to you on _____. The check will include all time worked (including any applicable overtime) and all earned but unused vacation (or PTO) time.
- **Items for Check-in** - On (last day of work), you will need to check in all (Company Name) property that has been issued to you. These include: (identification badge, keys, parking pass, etc.).
- **Eligibility for Future Employment** - No final decisions have been made at this time, but if (Company Name) determines that it will re-staff _____ positions in the future, you may apply and be considered for positions for which you qualify. You can monitor open positions by calling _____ (or website).
- **Unemployment Compensation** - You may be eligible for Unemployment Compensation. Please call _____ or visit the Unemployment Compensation office at _____ for further information.