

To: Wyoming Business Alliance Members  
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## **Considerations for Furloughs, Layoffs and Reductions in Force**

The COVID-19 pandemic has created huge challenges for employers. Faced with declining business activity and revenues, many employers will be forced to reduce workforce costs through furloughs, layoffs or reductions in force. While few will question the need for reductions in the current environment, adverse employment decisions always carry risk. This memo is intended<sup>1</sup> to guide Wyoming employers through various legal and practical issues to consider while preparing for staffing reductions.

A word about terminology. Furloughs are generally considered to be temporary reductions in work hours or unpaid time off due to business conditions without a formal separation of employment. A layoff is usually considered to result in the separation of employment, in some cases with an expectation of recall when conditions improve. Finally, a reduction in force (RIF) involves the separation of employment and the permanent elimination of positions without any expectation that the separated employees will recover their jobs. Layoffs and RIFs carry more risks because of the greater impact on released employees, but all three actions are adverse employment decisions that can be challenged through legal action. This memo uses layoff and RIF interchangeably because the legal aspects of those measures are very similar.

### **I. Legal Risks**

Discrimination claims are the primary source of legal liability for employers following a furlough, layoff or RIF. These claims arise when former employees feel they were selected for separation because of their age, sex, disability, national origin or another protected characteristic. Age discrimination claims predominate after RIFs, as older employees often feel employers take advantage of difficult economic circumstances to rid themselves of older, more expensive employees. Regardless of the specific allegations, the employer's best defense is well-articulated reasons for the action, followed by objectively implemented selection decisions. And, being an at-will employer is meaningless when it comes to discrimination claims.

Other sources of employee rights can create legal risks, as well. For example, collective bargaining agreements with unions often dictate aspects of how furloughs and layoffs must be conducted and how employees must be recalled. Employer policies might create expectations relating to the role of seniority in layoff decisions and can create implied contracts if the

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<sup>1</sup> This memo is not intended to constitute legal advice, but rather to provide a general discussion of issues and considerations. Employers planning workforce reductions should consult qualified counsel and obtain confidential advice suited to specific circumstances. This memo is not intended to create an attorney-client relationship between Holland & Hart LLP and any member of the Wyoming Business Alliance or other recipient.

employer has not used effective disclaimers. And, for larger layoffs, the federal Worker Adjustment and Retraining Notification Act (WARN) may require employers to give sixty days' notice of an upcoming employment loss.<sup>2</sup>

Furloughs in the form of reduced schedules or mandatory leaves without pay present less legal risk because these actions are more likely to be temporary. However, employees who are exempt from overtime under the Fair Labor Standards Act must be paid on a salary basis, meaning they receive the same amount of weekly salary (at least \$684 per week) without reduction for the quality or quantity of work, for every week in which they perform any work. If exempt employees are to be furloughed without pay, the furloughs should be for full workweeks. And, the exempt employees must be directed to perform no work during furlough weeks.

Finally, the recently created Families First Coronavirus Response Act and CARES Act do not directly limit employers' options for layoffs and RIFs; however, under the Paycheck Protection Program amended in the CARES Act, loan forgiveness may be reduced or eliminated if the employer lays off staff after taking a Paycheck Protection loan. Also, the paid leave rights provided by the Families First act include discrimination protections for employees, so any layoff or RIF must not appear to target employees who have exercised leave rights under that act.

## II. Establishing the Reasons and the Targets for the Action

Most courts defer to an employer's economic reasons for implementing a layoff or RIF, assuming those reasons are not contradicted by actual conditions or by subsequent actions or statements of the employer. As a result, it is important to articulate and reach consensus among leadership on the following elements:

- **Why is such an action required?** The pandemic is the obvious macro-economic reason for current layoffs and RIFs, but an organization should prepare a careful and factual explanation of its specific business conditions that make a workforce reduction necessary. All management decision-makers should concur with this statement because the need for consistency throughout the program is very important. And, the explanation should be reduced to writing so it can be used in the various communications that will be part of the layoff or RIF process.
- **What are the objectives for the RIF?** While the uncertainty of the pandemic makes future planning difficult, consider establishing specific financial goals for the layoff or RIF that are tied to your business circumstances and projections. These goals will help determine how many employees will need to be separated and may assist in focusing the separations in the departments or locations where the business challenges are most significant. A program that is designed to reach

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<sup>2</sup> WARN Act requirements generally apply to plant or facility closings that impact 50 or more employees, or mass layoffs involving 50 or more employees and 33% of the workforce at a single site of employment. Counsel should be consulted for questions regarding WARN applicability and compliance.

a specific objective is likely to be easier to explain and defend than a program with an open-ended or qualitative goal.

- **How do we meet those goals?** The diagnosis of your business challenges may naturally lead to the specific actions you need to take to meet the goals. Will we require every department to eliminate a certain number of positions or a percentage of controllable expense, or is the objective measured at an organizational level? Are some departments or positions “safe” or off-the-table? Will some projects be eliminated entirely? As these decisions are made, the management team should agree on the business reasons for those decisions.
- **What obvious cost-saving measures can be implemented before or at the same time as the RIF?** Consider and implement alternatives that may reduce the depth of the reduction, such as the elimination of leased, temporary or independent contractor relationships; a reduction in outsourcing of functions; temporary furloughs; or other suitable options, if any. Cutting non-payroll expenditures first is a good step to help prove that the company had no choice but to eliminate jobs.

### **III. Selection Criteria for Positions to be Eliminated and Employees to be Separated**

If entire facilities or units of the employer’s operations are being closed and all employees will be laid off, the selection process is straightforward and hard to attack. However, if the workforce is only being reduced, rather than eliminated, employers need to select the employees who will continue to have jobs and those who will not. Legal challenges to layoffs and RIFs often attack the process the employer used for those decisions. The more these decisions are based on objective criteria, the stronger the defense if you are sued. On the other hand, if subjective considerations play a determining role, disgruntled employees can more easily claim that their age, sex, disability or other protected characteristic was the real motivating factor for their position elimination. The following process can help employers develop a RIF plan that accounts for how layoffs create risk:

- **Prepare the New Organizational Chart First.** Begin by planning the post-RIF organizational structure without identifying who will fill the surviving positions. This is an essential first step and the only way to manage the risks of bias that can intrude in any analysis that focuses on who is currently in particular jobs. You need to be able to say without contradiction that positions were eliminated, not particular people.
- **Prepare the Reasons for Eliminating Positions.** Articulate the reasons for the elimination of each position, again, by title, not by employee name. Tie the company’s business challenges to the action taken regarding the particular position, i.e., because sales are down 30%, we believe we need 30% fewer delivery drivers. Each position elimination decision needs to have a business

rationale that has nothing to do with the people holding that position. Risk creeps into this process as soon as a position is considered for elimination because the person in the position has chronic performance problems or has missed a lot of work due to health issues or is a malcontented complainer. If the position is eliminated without a strong, objective business justification, the employee will more easily believe that discriminatory motive played a role.

- **Have You Followed Company Policies?** Be certain that any relevant employment policies or procedures have been followed in the selection process to avoid breach of contract claims, including historical policies that might be more rigorous than current policies.
- **What criteria will you use to evaluate employees in competition for the remaining positions?** In each situation where you are laying off some but not all the individuals in a position or job title, you need to develop criteria for selecting among those who hold that job. Develop and document these criteria. Obviously, the criteria must be completely neutral with respect to gender, age, disability and other protected characteristics. Some employers will develop a scoring system with several important criteria, and then use the scores to rank the employees for retention and separation. For example, a manufacturing company might adopt criteria that gives more weight to the equipment an employee is trained to operate, or deduct points based on safety incidents or accidents. More subjective criteria like teamwork or attitude must be well-defined using specific behavioral examples so managers scoring the employees apply the criteria consistently and based on actual observations of behaviors rather than hunches or vague opinions.
- **Use of Performance Evaluations.** Use of performance evaluations for ranking employees can be difficult because performance evaluations sometimes do not collect data that easily translates into numeric scores. Also, performance evaluations can demonstrate the Lake Wobegon effect – all are above average – which makes it difficult to differentiate between employees based on those scores. And, employees selected for layoff may claim that supervisory bias skewed the evaluations. Even though the evaluations may not be directly useful for ranking employees, ultimately the overall theme of an employee’s performance evaluations should be generally consistent with how the employee’s scores, or the employer needs a good explanation as to why that is not the case.
- **Can You Use Seniority as a Factor?** Seniority is rarely a prime indicator of employee value or success, but it is a very objective factor. Consider some use of seniority in selecting the retained employees among those in similar positions competing for a limited number of jobs, i.e. “we retained the most qualified individual and where qualifications were equal, seniority was the tie breaker.” It is the most objective factor available and can be a strong defense to age bias claims.

- **Group Decision Making.** Consider making selection decisions using a team of managers. Each member of the team with knowledge of the employees could individually score the employees under consideration, with the scores assigned by each manager averaged for the employees final score. This can be particularly helpful to level the impact of hard and soft graders, and to blunt allegations that a manager with a grudge caused an employee to be selected for reduction.
- **Documentation.** Clearly document the reasons for the selection decisions you make. As employees' scores are discussed among the group, keep notes about the employee conduct or performance that justifies the scores for each criterion. Litigation usually focuses on the process of selecting which employees will be retained and which will be severed: Why was an older diesel mechanic RIF'd while a younger mechanic kept his job? The ability to articulate the objective justification for each score months or years after the decision is critical, and good documentation is the key.
- **Drawing the Line.** Once the scoring and ranking process is complete, you will need to make the difficult decision about where to draw the line that separates those who will keep their jobs and the others. This line should be data-driven, based on the wage and benefit costs of the employees on the list and the department or unit's expected contribution to the cost-savings goal driving the RIF. If the line is drawn based on any considerations other than the necessary cost savings, it should not be based on the characteristics of any employee on the list.
- **Exceptions Should Be Few.** Once the employees are ranked according to their scores, any exceptions to the results dictated by the list and the line between those who will be retained and those who will be separated will be prime targets for attack if the RIF faces legal challenges. Hopefully, business cases for retaining particular employees because of skills, value to the company or unique circumstances will have been resolved much earlier in the process, before the scoring and ranking. Now, any exceptions need to be carefully investigated and documented so you can prove a legitimate, non-discriminatory reason why one person was retained, and someone above him on the list was laid off.

#### IV. Implementing the Reduction

Once you have selected the employees who will be laid off or separated, several steps are necessary before you are prepared to notify the employees.

- **Adverse Impact Analysis:** RIFs are often challenged based on the statistical analysis of the likelihood that the number of minority employees were selected for separation without any discriminatory motive. Test the results of your employee ranking for adverse impact, also known as disparate impact, on protected classes,

including age and gender. This should be done by statistically analyzing the organization as a whole and each department separately. Adverse impact calculators are available online<sup>3</sup> but this analysis often requires the assistance of a qualified statistician and employment counsel.

- **Separation Benefits:** Wyoming law does not require employers to offer any sort of separation or severance benefits to separated employees. However, many employers offer severance to help former employees bridge the gap to a new job, and to serve as consideration to support a release of any legal claims. In addition to cash, a separation offer can include outplacement assistance, relocation assistance, company-paid COBRA insurance continuation or continuing EAP eligibility, for example. The amount of a cash benefit can be equal for all employees, can vary based on seniority, or be based on a percentage of compensation over a selected period. The only requirement is a practical one: if you intend to ask employees to sign a release agreement in exchange for the benefit, the value of the benefit needs to be meaningful.
- **The Release:** If you offer a meaningful separation benefit, it should be offered on the condition that employees must sign a release of claims. Nothing is more frustrating than to pay a worthwhile separation benefit to an employee, only to have the employee use the money to hire a lawyer and file a lawsuit. Separation agreements are generally enforceable under Wyoming law, but a separation agreement that waives or releases age discrimination claims must comply with very technical timing, wording and notification requirements under the Older Workers' Benefit Protection Act. In summary, employees must be given information about the titles and ages of every employee considered for termination and those selected for termination; employees must be given 45 days to consider the agreement and must be given 7 days after signing the agreement to revoke it; and, employees must be advised in writing to consult with counsel before signing the agreement. Preparation of the agreement and the data that must be included with the agreement takes time.
- **Notifying the Terminated Employees:** Handling the separation process with care is very important to managing the risk of layoffs and RIFs. Consider these steps:
  - Consider where to conduct the separation meetings. If privacy is not available in your facility, consider renting a hotel conference room or some other location where employees can come and go without the stares of coworkers.

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<sup>3</sup> <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/adverse-impact-calculation-spreadsheet.aspx>; <https://hr-software.net/EmploymentStatistics/DisparateImpact.htm>

- Communication with the selected employees should occur within a very brief time, and a consistent message should be stated to every employee. These meetings are likely to be emotional and having a script to follow will help avoid straying into difficult or unnecessary topics. Some employers find it helpful to give each employee a brief letter explaining the reasons for the separation and how decisions were made, but without any employee-specific information. The letter can serve as the script for the manager's explanation during the meeting, and the employee can take the letter to help explain the situation to their family and support a claim for unemployment benefits.
- Some employees will express their anger or other emotions. Be prepared for this, and be prepared with short, compassionate non-defensive responses that do not apologize, accept blame or otherwise undermine the necessity of the action.
- It is very helpful to be prepared to give each employee their final paycheck including the payout of any accrued leave required under your policies,<sup>4</sup> information about benefit continuation including COBRA notices, information about how to apply for unemployment benefits, and the separation agreement if applicable. (If you offer a separation agreement, the 45-day consideration period will begin to run from the date the employee receives the agreement, but the employee's termination will be effective immediately.)
- Arrange to return the employee's personal belongings and for the employee to return any company property. It is important not to require the employee to carry his belongings through a crowded locker room or out the front door of the office. Allowing the employee to retain his or her dignity is critical.
- **Manager Training:** Managers who will remain after the reduction will need training on the appropriate message to be conveyed to retained employees, and what messages and statements should be avoided.
- **Recall.** Hopefully, our current economic conditions will improve as the pandemic slackens, and employers will be able to recall former employees to their jobs. Unless your recall options are controlled by a collective bargaining agreement or other legal authority, we advise employers not to predict or promise recall when layoffs are announced or implemented. In most cases, layoffs and RIFs result in the separation of the employment relationship and employers have no duty to rehire former employees. When the time comes, you can better select

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<sup>4</sup> Wyoming law does not require you to provide final paychecks until the next regularly scheduled payday but waiting on the final pay adds trauma to the process for the employees.

those who will be stronger contributors if you have not made promises to the entire group. Also, if the ranking you did to decide who to layoff was objective and non-discriminatory, rehire decisions based on that ranking will also be difficult to attack.

**V. Conclusion**

Obviously, every layoff or RIF is unique, just as every company is different. These considerations are met to assist with careful advance planning, not to answer every question that will be raised by a layoff within your company or organization. While we hope that will not be necessary, we stand ready to assist you if needed.

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